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## Sex Offender Registration: Community Safety or Invasion of Privacy?

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# NOTES

## SEX OFFENDER REGISTRATION: COMMUNITY SAFETY OR INVASION OF PRIVACY?

### INTRODUCTION

An individual's right to privacy, although not specifically enumerated in the Constitution,<sup>1</sup> has been adjudicated a fundamental right.<sup>2</sup> When embodied in legislation that is presumed to be constitutional, this fundamental right is steadfast.<sup>3</sup> Although

<sup>1</sup> See *Griswold v. Connecticut*, 381 U.S. 479, 484-85 (1965). A general right to privacy was found to exist through a collaboration of the penumbras of the First, Third, Fourth, and Fifth Amendments to the Constitution. *Id.*; see also *Roe v. Wade* (opinion of J. Blackmun), 410 U.S. 113, 153 (1973). Later, the Supreme Court specifically ruled the right to privacy to be a fundamental right under the Fourteenth Amendment. *Id.*; *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972). The limits of this right were specified to include the right of an individual to be free from unwanted governmental intrusion into private matters. *Id.*

<sup>2</sup> See *Griswold*, 381 U.S. at 482-84. The Supreme Court recognized that penumbras within the guarantees afforded by the Bill of Rights create such things as "zones of privacy". *Id.* at 484. See, e.g., *Doe v. Poritz*, 661 A.2d 1335 (N.J. Super. Ct. Law Div. 1995), *aff'd*, 662 A.2d 367, 412 (N.J. 1995). That right of privacy is encompassed within the provisions of Article 1, § 1 of New Jersey Constitution. *Id.*

<sup>3</sup> See *People v. Afrika*, 648 N.Y.S.2d 235, 238 (Sup. Ct. 1996) (acknowledging as fundamental precept legislative enactment's strong presumption of constitutionality); State

federal<sup>4</sup> and state<sup>5</sup> constitutions guarantee the right to privacy,<sup>6</sup> numerous court decisions have compromised this right<sup>7</sup> in order to further the respective objectives of various states.<sup>8</sup> In particular, state concern for protecting communities from recidivist sex offenders<sup>9</sup> is viewed as an objective that outweighs an individual's right to privacy.

Incidents of child molestation and murder, brought to the forefront by the media,<sup>10</sup> have horrified and outraged both the public

v. Calhoun, 669 So. 2d 1351, 1358 (La. App. 1st Cir. 1996) (stating "statutes are presumed to be valid and constitutionality of statute should be upheld whenever possible").

4 See *Griswold*, 381 U.S. at 484-85 (acknowledging general right to privacy existing through collaboration of penumbras of First, Third, Fourth, and Fifth Amendments to Constitution); see also *Eisenstadt*, 405 U.S. at 453 (noting limits of privacy right to include right of individual to be free from unwanted governmental intrusion); *Roe*, (opinion of J. Blackmun), 410 U.S. at 153 (ruling right to privacy to be fundamental right under Fourteenth Amendment).

5 See, e.g., *Doe v. Poritz*, 661 A.2d 1335 (1995), *aff'd*, 662 A.2d 367, 411 (N.J. 1995). "With its declaration of the right to life, liberty and the pursuit of happiness, Article I § 1 of the New Jersey Constitution encompasses the right to privacy." *Id.*

6 See *Whalen v. Roe*, 429 U.S. 589, 599-600 (1977) (recognizing two separate interests embodied in individuals right to privacy: (1) avoiding disclosure of personal matters and (2) independence in making certain decisions).

7 See generally *Alan A. v. Verniero*, 970 F. Supp. 1153, 1195 (D.N.J. 1997) (denying details and circumstances of conviction as private matter); *Doe et. al. v. Kelley*, 961 F.Supp. 1105, 1112 (W.D.MI. 1997) (finding that implementing Michigan Sex Offender Act does not violate due process or right to privacy); *State v. Calhoun*, 669 So.2d 1351, 1358 (La. App. 1st Cir. 1996) (imposing standard of strict scrutiny in reviewing state legislation); *Doe v. Poritz*, 661 A.2d 1335, 1345-47 (N.J. Supr. Ct. Law Div. 1995), *aff'd.*, 662 A.2d 367, 411 (N.J. 1995) (holding that sex offender's right to privacy is not violated by sex offenders notification statute).

8 See Peter Finn, *Sex Offender Community Notification*, (visited Nov. 11, 1997) <<http://www.NCJRS.ORG/txtfiles/162364.txt>> (discussing public's determination to take action in prevention of commission of crimes).

9 See N.Y. CORRECT. LAW § 168, Historical and Statutory Notes (McKinney Supp. 1996) (propounding that legislature's intent behind enactment of sex offender registration and notification laws was to enhance safety within communities); see also Tara L. Wayt, Note, *Megan's Law: A Violation of the Right to Privacy*, 6 TEMP. POL. & CIV. RTS. L. REV. 139, 141 (Fall 1996-Spring 1997) (stating that court decided that state's interest in protecting society from recidivist sex offenders outweighs invasion of registrant's privacy); Finn, *supra* note 8 (stating community notification and registration together offer adequate protection to public against released sex offenders).

10 See David Kaplan, *The Incurrigibles*, NEWSWEEK, Jan. 15, 1993, at 48-49. In 1989, a seven year old boy was lured into a wooded area in Tacoma, Washington by Earl Shriner, a prior sexual offender out on bail pending trial for a rape charge. *Id.* Shriner raped, stabbed, and mutilated the child, finally leaving him to die. *Id.*; see also Michele L. Earl-Hubbard, *The Child Sex Offender Registration Laws: The Punishment, Liberty Deprivation, and Unintended Results Associated With the Scarlet Letter Laws of the 1990s*, 90 NW. U.L. REV. 788, 794 (1996). In 1990, eleven year old Jacob Wetterling was abducted from his home in Minnesota. *Id.* Jacob was never found, nor was his abductor brought to justice. *Id.* On July 15, 1993, ten year old Zachary Snider was molested and murdered by a released sex offender whose criminal record was unknown to the community in which he resided. *Id.* In July 1994, Jesse Timmendequas, a two-time convicted child sex offender, lured seven year old Megan Kanka into his house where he strangled her with a belt, sexually assaulted her, and then discarded her body in a toybox. *Id.* Timmendequas con-

and the government.<sup>11</sup> Such highly publicized tragedies have fostered a national outcry that has resulted in the enactment of more exacting penalties for sexual offenders.<sup>12</sup> In 1990, Washington was the first state to formulate a community notification and registration statute for convicted sex offenders on parole.<sup>13</sup> Subsequently, all other states have enacted similar legislation.<sup>14</sup> As

fessed to the killing. *Id.*; *Sex Offender Indicted in Megan Kanka's Slaying—Death Penalty Will Be Sought, Prosecutor Says*, RECORD, Oct. 20, 1994, at A3. The courts subsequently indicted this convicted sex offender for kidnapping, rape and murder. *Id.*

11 See Hal Spencer, *Victim's Mother Glad Predators Locked Up*, SEATTLE TIMES, May 15, 1994, at B1. Shriner was arrested for this incident. *Id.* The Washington state legislature reacted by passing a statute requiring convicted child sex offenders to register with local law enforcement. *Id.*; see also 42 U.S.C.A. § 14071(g)(2) (1998). The states that fail to implement the program, as defined by the Federal government, will lose their Section 3756 allocations. *Id.*; Earl-Hubbard, *supra* note 10, at 796. The sole purpose of the Jacob Wetterling Act was to encourage states to enact child sex offender registration laws. *Id.*

12 See Sheila A. Campbell, *Battling Sex Offenders: Is Megan's Law an Effective Means of Achieving Public Safety?*, 19 SETON HALL LEGIS. J. 519, 535-37 (1995). After the deaths of Megan Kanka and Amanda Wengert, proposals were ushered to the floor and the New Jersey legislature acknowledged the need for more stringent sex offender laws. *Id.*; *Suspect Confessed in the Murder of a 7 Year Old, Prosecutors Say*, N.Y. TIMES, Aug. 4, 1994, at B2. As a result of such horrific crimes against children, individual states have reacted by enacting registration laws for convicted sex offenders. *Id.* To encourage remaining states to enact versions of child sex offender registration statutes, the Jacob Wetterling Act required states to enact such provisions by 1997, or face losing ten percent of their federal grant money allocated for state crime-fighting programs. *Id.*; Henry Stern, *Clinton Gets GOP Praise on "Megan's Law"*, RECORD, Aug. 18, 1994, at A3. As Congressman Zimmer commented, "If Megan Kanka's parents or Amanda Wengert's parents knew, they would have protected their kids. *Id.*

13 See WASH. REV. CODE § 9A.44.130 (West 1990)(requiring sex offenders and kidnapping offenders to register with sheriff of county of offender's residence).

14 See ALA. CODE § 13A-11-200 to -203 (Michie 1994); ALASKA STAT. § 12.63.010 (Michie 1996); ARIZ. REV. STAT. ANN. § 13-3821 to -3824 (West 1996); ARK. CODE ANN. §§ 12-12-901 to -909 (Michie Supp. 1995); CAL. PENAL CODE ANN. § 290 to 290.6 (West Supp. 1997); COLO. REV. STAT. ANN. § 18-3-412.5 (West Supp. 1996); CONN. GEN. STAT. ANN. § 54-102r(b) (West 1996); DEL. CODE ANN. Tit. 11, § 4120 (1995); FLA. ADMIN. CODE ANN.r. 775.21 (West Supp. 1997); GA. CODE ANN. § 42-9-44.1 (1995); HAW. REV. STAT. § 846E 1-9 (1997); IDAHO CODE § 18-8301 to -8311 (1997); ILL. COMP. STAT. ANN. 150/1-10 (West Supp. 1997); IND. CODE ANN. 5-2-12-1 to -3 (1997); IOWA CODE ANN. § 692A.1-.15 (West Supp. 1997); KAN. STAT. ANN. § 22-4901 to -4910 (1996); KY. REV. STAT. ANN. § 17.510 (Michie 1996); LA. REV. STAT. ANN. §§ 15:540-549 and 15:578(A)(7) (West Supp. 1997); MASS. GEN. LAWS ANN. ch. 6, § 178K (West 1997); ME. REV. STAT. ANN. tit. 34-A § 11001-004 (West 1996); MD. CODE ANN., [Crim. Law] § 878 (1995); MICH. COMP. LAWS ANN. §§ 28.721 to .732 (West 1997); MINN. STAT. ANN. § 243.166 (West 1994); MISS. CODE ANN. §§ 45-33-1 to -19 (West Supp. 1997); MO. ANN. STAT. §§ 566.600-.625 (West Supp. 1997); MONT. CODE ANN. §§ 46-23-501 to -508 (1997); NEB. REV. STAT. § 29.4005 (1996); NEV. REV. STAT. ANN. §§ 207.151-.157 (Michie 1997); N.H. REV. STAT. ANN. § 632-A:11 to -A:19 (Supp. 1995), repealed effective 8/9/96; N.J. STAT. ANN. §§ 2C:7-1 to -5 (West 1997); N.M. STAT. ANN. § 29-11A-1 to -8 (Michie 1996); N.Y. CORRECT. LAW § 168 (McKinney Supp. 1997); N.C. GEN. STAT. § 14-208.5 to .11 (Michie 1995); N.D. CENT. CODE § 12.1-32-15 (Supp. 1995); OHIO REV. CODE ANN. §§ 2950.01 to -13, 2950.99, (1997); OKLA. STAT. ANN. tit. 57, § 581-88 (West Supp. 1998); OR. REV. STAT. §§ 181.594 to .602 (1995); 42 PA. CONS. STAT. § 9791-9799.6 (West 1996); R.I. GEN. LAWS § 11-37.1-1 to 11-37.1-19 (1996); S.C. CODE ANN. § 23-3-400 to -490 (Law. Co-op. 1996); S.D. CODIFIED LAW ANN. § 22-22-31 to -39 (Supp. 1997); TENN. CODE ANN. § 40-39-101 to -110 (Michie 1997); TEX. CODE CRIM. P.ANN. art. 62.02 (1994); UTAH CODE ANN. § 77-27-21.5 (Michie Supp. 1997); VA. CODE

a result of these statutes, convicted sex offenders are required to register with local law enforcement authorities upon release from prison and relocation to a new community.<sup>15</sup> Members of the general public may access such information upon request, either in person, at the local law enforcement office<sup>16</sup>, by telephone<sup>17</sup> or through the internet.<sup>18</sup>

New York has adopted its own version of a community notification and registration statute, known as the Sex Offender Registration Act.<sup>19</sup> Part I of this Note discusses the New York Sex Offender Registration Act in detail. Part II addresses the issue of whether the notification aspect of the New York Sex Offender Registration Act<sup>20</sup> impermissibly infringes upon the offender's constitutional right to privacy.<sup>21</sup> This section further balances

ANN. §§ 19.2-298.1 to -298.4, 19.2-390.1, 53.1-116.1 (Michie 1997); VT. STAT. ANN. tit. 13, § 5401-5413 (1997); WASH. REV. CODE §§ 9A.44.130 to -140 (West Supp. 1997); W. VA. CODE § 61-8f-1 to -10 (Michie Supp. 1997); WIS. STAT. § 301.45 (West Supp. 1997); WYO. STAT. § 7-19-301 to -306 (Michie 1997).

<sup>15</sup> See *supra* note 14 and accompanying text.

<sup>16</sup> See *supra* note 14 and accompanying text.

<sup>17</sup> See, e.g., N.Y. CORRECT. LAW § 168-p (McKinney Supp. 1997) (establishing "900" telephone number through which residents/public may inquire whether specific individual is listed); Jon R. Sorensen, *Dial For Sex Predator Info.*, DAILY NEWS, Apr. 1, 1998, at 26 (noting that for \$5.00 state resident can call (900) 288-3838 and give name to be checked against list of 7,000 convicted sex criminals).

<sup>18</sup> See David Hakala, *Megan's Law in Cyberspace*, NEWSDAY, Sept. 24, 1997, at C3. Web site postings of the names, rap sheets and location of sex offenders have become an accessible means by which communities may protect themselves. *Id.* Alaska, Florida, Virginia, Indiana, Kansas, Georgia, and Michigan have all elected to provide internet access to registrations. *Id.* New York's sex offender registry may also soon be accessible through cyberspace. *Id.*; see also Kimberly O'Brian, *Most Roanokers Praise Sex Offender Registry, Civil Rights Watchdogs, However, Say It's An Invasion of Privacy*, ROANOKE TIMES & WORLD NEWS, Jan. 4, 1999, at C1. The Virginia state police posts the names and addresses of more than 4,600 violent sex offenders on its website at <<www.vsp.state.va.us>>. *Id.*; Michael Stroh, *Maryland May List Sex Convicts On Web; Officials Watching Stampede To VA Site "With Great Interest"*, BALTIMORE SUN, Jan. 11, 1999, at 1A. This website provides the offender's name, address, a physical description, photograph and details of the crime. *Id.* Users can search the database of violent sex offenders by name, county, city, or zip code. *Id.* Similarly, Maryland's Department of Public Safety and Correctional Services maintains a website at <<www.dpccs.state.md.us>> that explains how to obtain a list of sex offenders, but does not list these offenders. *Id.*

<sup>19</sup> See N.Y. CORRECT. LAW § 168 (McKinney Supp. 1997) (requiring registration by convicted sex offenders, and providing for community notification of registration information).

<sup>20</sup> See N.Y. CORRECT. LAW § 168 (McKinney Supp. 1997) (requiring registration by convicted sex offenders, and providing for community notification of registration information).

<sup>21</sup> See *Griswold v. Connecticut*, 381 U.S. 479, 484-85 (1965) (acknowledging general right to privacy existing through collaboration of penumbras of First, Third, Fourth, and Fifth Amendments to Constitution); see also *Roe v. Wade*, (opinion of J. Blackmun), 410 U.S. 113, 153 (1973) (ruling right to privacy to be fundamental right under Fourteenth Amendment); *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) (noting limits of privacy right to include right of individual to be free from unwanted governmental intrusion).

the offender's right to privacy<sup>22</sup> with the legislature's interest,<sup>23</sup> in and the general public's demand for protection.<sup>24</sup> Part III examines the consequences of extending such provisions to all repeat violent offenders.

## I. THE NEW YORK SEX OFFENDER REGISTRATION ACT SCHEME

New York passed a community notification and registration statute, based on New Jersey's Megan's Law,<sup>25</sup> called the New York Sex Offender Registration Act ("NYSORA"),<sup>26</sup> in response to growing public concern over the grave threat posed by sex offenders in their communities.<sup>27</sup> The legislature articulated that the objectives behind NYSORA are: (1) to protect members of the community, particularly children, by notifying the community of the presence of individuals who may pose a danger, and (2) to enhance law enforcement authorities' ability to investigate and

<sup>22</sup> See *Doe v. Attorney Gen. of the U.S.*, 941 F.2d 780, 796 (9th Cir. 1991) (declaring that governmental use of private information results from balancing government's interest on having or using information against individual's interest in denying access to information); *United States v. Westinghouse Elec. Corp.*, 638 F.2d 570, 577-78 (3d Cir. 1980) (reconciling privacy interests of employees in their medical records with significant public interest in research designed to improve occupational safety and health).

<sup>23</sup> See *State v. Clark*, 880 P.2d 562, 565 (1994) (citing Laws of 1990, ch.3 at 401 which state that registration provisions have been helpful in aiding law enforcement agencies protect their communities).

<sup>24</sup> See Kaplan, *supra* note 10, at 48. In 1991, experts estimated that approximately 173,000 rapes and attempted rapes were committed in the United States. *Id.* Further, the same study approximated the number of child sex abuse cases for that year to be 138,000. *Id.*; see also The National Center for Missing & Exploited Children, *THE LEGAL VALIDITY AND POLICY CONCERNS ASSOCIATED WITH COMMUNITY NOTIFICATION FOR SEX OFFENDERS* 1 (Sept. 1995). Studies have indicated that 61% of rape victims are less than 18 years old and 29% are less than 11 years old. *Id.*

<sup>25</sup> See N.J. STAT. ANN. § 2C:7-1 to -5 (West 1997) (enumerating provisions of "Megan's Law").

<sup>26</sup> See N.Y. CORRECT. LAW § 168-168v (McKinney Supp. 1997). New York became the forty-third state in the country to enact sex offender registration legislation, requiring individuals convicted of sex offenses to register with local law enforcement agencies, and the thirtieth state to provide for community notification and dissemination of registration information. *Id.* See generally Alison Virag Greissman, *The Fate of Megan's Law in New York*, 18 CARDOZO L. REV. 181, 182 (1996). Constructed by example, NYSORA will likely survive constitutional attacks as did similar sex offenders statutes in other states. *Id.*

<sup>27</sup> See *Doe v. Pataki*, 919 F. Supp. 691, 694 (S.D.N.Y. 1996) [hereinafter *Doe I*]. Sex offenders, as a group, are perceived as more likely to repeat their crimes. Some studies put the recidivism rates for sex offenders between 40-60%. *Id.*; See Jan Hoffman, *New Law Urged On Freed Sex Offenders*, N.Y. TIMES, Aug. 4, 1994, at B1. Other studies show recidivism rates to be as high as 80%. *Id.* But see Robert E. Freeman-Longo & Ronald V. Wall, *Changing a Lifetime of Sexual Crime: Can Sex Offenders Ever Alter Their Ways? Special Treatment Programs Provided Some Hope*, PSYCHOL. TODAY, March 1986, at 58. There exists a strong possibility of rehabilitation for released sex offenders. *Id.*

prosecute sex crimes.<sup>28</sup>

### A. Persons Covered by the Act

Under NYSORA, a "sex offender" is any person convicted of a "sex offense" or a "sexually violent offense".<sup>29</sup> "Sex offenses" include such crimes as rape in the second<sup>30</sup> or third degree,<sup>31</sup> sodomy in the second<sup>32</sup> or third degree,<sup>33</sup> sexual abuse in the second degree,<sup>34</sup> and convictions for attempts thereof.<sup>35</sup> "Sexually vio-

<sup>28</sup> N.Y. CORRECT. LAW § 168 (McKinney Supp. 1996), Legislative Findings and Intent of L.1995, c.192. L.1995, c.192, § 1, eff. Jan. 21, 1996.

The preamble to NYSORA states:

The legislature finds that the danger of recidivism posed by sex offenders, especially those sexually violent offenders who commit predatory acts characterized by repetitive and compulsive behavior, and that the protection of the public from these offenders is of paramount concern or interest to the government. The legislature further finds that law enforcement agencies' efforts to protect their communities, conduct investigations and quickly apprehend sex offenders are impaired by the lack of information about sex offenders who live within their jurisdiction and that the lack of information shared with the public may result in the failure of the criminal justice system to identify, investigate, apprehend and prosecute sex offenders.

The system of registering sex offenders is proper exercise of the state's police power.. Registration will provide law enforcement with additional information critical to preventing sexual victimization and to resolving incidents involving sexual abuse and exploitation promptly. It will allow them to alert the public when necessary for the continued protection of the community.

*Id.*; see also *Doe v. Pataki*, 120 F.3d 1263 (2d Cir. 1997)[hereinafter *Doe III*] (noting goals of NYSORA as community protection and augmented law enforcement); *Doe v. Pataki*, 940 F. Supp. 603, 606-07 (S.D.N.Y. 1996)[hereinafter *Doe II*] (noting that legislatures articulated these two goals in enacting such laws); *Doe I*, 919 F. Supp. at 694-95 (S.D.N.Y. 1996) (discussing law enforcement agencies' efforts to protect their communities and apprehend sex offenders).

<sup>29</sup> See N.Y. CORRECT. LAW § 168-a(2) and -a(3) (McKinney Supp. 1996) (noting "sex offender" includes any person who is convicted of any of offenses set forth in the provisions of §168-a(2) and -a(3)); see also *People v. Griffin*, 652 N.Y.S.2d 922, 924 (1996) (explaining "sex offender" within meaning of NYSORA).

<sup>30</sup> See N.Y. PENAL LAW § 130.30 (McKinney 1996) (stating that person is guilty of rape in second degree when defendant is over 18 and engages in sexual intercourse with someone under 14 and unmarried).

<sup>31</sup> See *id.* at § 130.25 (providing that person is guilty of rape in third degree when he engages in sexual intercourse with another person to whom he is not married, who is incapable of consent, or when he is over 21 and engages in sex with another who is under 17).

<sup>32</sup> See *id.* at § 130.45 (stating that person is guilty of sodomy in second degree when he is 18 or over and engages in deviate sexual intercourse with another person less than 14).

<sup>33</sup> See *id.* at § 130.40 (providing that person is guilty of sodomy in third degree when he engages in deviate sexual behavior with person incapable of consenting, or when he is 21 or older and engages in deviate sexual intercourse with person under 17).

<sup>34</sup> See *id.* at § 130.60 (defining person guilty of sexual abuse in second degree when he subjects another, who is incapable of consent or is under 14, to sexual contact).

<sup>35</sup> See N.Y. PENAL LAW § 110.05 (McKinney 1987 & Supp. 1996) (providing that attempt to commit crime is crime in itself).

lent offenses" include rape in the first degree,<sup>36</sup> sodomy in the first degree,<sup>37</sup> and sexual abuse in the first degree,<sup>38</sup> as well as attempts to commit such crimes.<sup>39</sup> All convicted sex offenders, including first time offenders, are subject to the requirements of NYSORA.<sup>40</sup>

### *B. The Registration Provision*

The first significant provision of NYSORA is the registration requirement.<sup>41</sup> Any person convicted of a sex offense or a sexually violent offense must register with the Division of Criminal Justice Services ("DCJS") within ten days after his<sup>42</sup> discharge, release, or parole.<sup>43</sup> Upon registration, the DCJS establishes and maintains a file containing the required information for each sex offender and sexually violent offender.<sup>44</sup> Included in the file is personal identifying information, a description of the offense, the date of the conviction, and the sentence imposed.<sup>45</sup> The state re-

<sup>36</sup> See *id.* at § 130.35 (defining rape in first degree as intercourse with female by forcible compulsion, or who is incapable of consent, or who is under 11).

<sup>37</sup> See *id.* at § 130.50 (defining sodomy in first degree as engaging in deviate sexual intercourse with another by forcible compulsion, or who is incapable of consent, or who is under 11).

<sup>38</sup> See *id.* at § 130.65 (defining sexual abuse in first degree as subjecting another person to sexual contact by forcible compulsion, or who is incapable of consent, or who is under 11).

<sup>39</sup> See *id.* at § 110.05 (providing when attempt to commit crime is crime in itself).

<sup>40</sup> See *Doe III*, 120 F.3d 1263, 1267 (2d Cir. 1997) (explaining that sex offenses include, for example, rape, sodomy, and attempts).

<sup>41</sup> See N.Y. CORRECT. LAW § 168-b to -i (McKinney Supp. 1997) (enumerating particulars of information compiled of each registrant and noting states right to make such registry information available to public).

<sup>42</sup> The authors use "he" and "his" generally to refer to sex offenders, and "she" and "her" to refer to sex crimes victims.

<sup>43</sup> See N.Y. CORRECT. LAW § 168-f(1) (McKinney Supp. 1997) (requiring any sex offender who is paroled to register within 10 calendar days to verify his intended place of residence); see also *Doe III*, 120 F.3d at 1267 (delineating requirements of who must register); *Doe II*, 940 F. Supp. at 606 (noting that sex offenders are required to register, including those incarcerated as of Acts effective date); *Doe I*, 919 F. Supp. at 695 (requiring offenders on parole or probation on effective date to register).

<sup>44</sup> See N.Y. CORRECT. LAW § 168-b(1) (McKinney Supp. 1997) (providing for compilation of registration information); see also *Doe III*, 120 F.3d at 1267 (explaining what information must be provided in offender's file).

<sup>45</sup> See N.Y. CORRECT. LAW § 168-b(1)(a), (c) (McKinney Supp. 1997). Such information includes an offender's name, date of birth, home address, sex, race, height, weight, eye color, and driver's license number. *Id.*; see also *Doe III*, 120 F.3d at 1267. An offender must provide specific identifying information upon his registration. *Id.*; *Doe II*, 940 F. Supp. at 606. In addition to identifying information, offender must provide a description of the offense. *Id.*; *Doe I*, 919 F. Supp. at 695. All information required of a convicted sex offender must be provided to the DCJS. *Id.*; Cf. TEX. PENAL CODE ANN. tit. 110A Art. 6252-13c.1 (1994). Sex offenders in Texas are required to provide additional details such



quires the offender to provide a photograph and a set of fingerprints.<sup>46</sup>

In addition to these requirements, those convicted of sexually violent offenses must register for a minimum of ten years and are potentially subject to lifetime registration.<sup>47</sup> They must register quarterly, instead of annually, and do so in person, rather than by mail.<sup>48</sup> The failure to register is a class A misdemeanor<sup>49</sup> for the first offense and a class D felony<sup>50</sup> for a second or subsequent offense.<sup>51</sup> Any sex offender, however, may petition the sentencing court to be relieved of registration duty.<sup>52</sup> Upon receipt of a petition, the court must obtain an updated report on the offender, from the Board of Examiners of Sex Offenders (the "Board"). After reviewing the Board's report, the court may grant or deny the relief.<sup>53</sup>

as alias, shoe six and social security number. *Id.*

46 N.Y. CORRECT. LAW §168-b (1)(b) (McKinney Supp. 1997)(listing requirements for registration); *see also Doe III*, 120 F.3d at 1267 (listing some of requirements for registering); *Doe II*, 940 F. Supp. at 607 (discussing legislative intent for passage of such registration laws); *Doe I*, 919 F. Supp. at 695 (listing registration requirements and information that must be provided). *See, e.g.,* ARK. CODE ANN. § 12-12-906 (Michie Supp. 1995)(requiring registration within 60 days of release); CONN. GEN. STAT. ANN. § 54-102r(b) (West 1996)(requiring registration within five days of release).

47 *Compare* N.Y. CORRECT. LAW § 168-o (McKinney Supp. 1997) (allowing convicted sex offender to petition sentencing court for discretionary relief from requirement of registration) and *Doe III*, 120 F.3d at 1267 (noting that sexually violent predators must verify information every 90 days for 10 years and potentially for life) *with* N.J. STAT. ANN. § 2C:7-2 (West 1997) (terminating required period of registration at fifteen years if no further crimes have been committed).

48 *Compare* N.Y. CORRECT. LAW § 168-f(3) (McKinney Supp. 1997) (requiring "sexually violent predators" to personally re-register with local law enforcement every 90 days after date of release or parole) *with Doe III*, 120 F.3d at 1267 (noting that sexually violent predators must register annually and personally verify registration at their local law enforcement agency) *with* N.J. STAT. ANN. § 2C:7-2 (West 1997) (making no mention of renewal requirements).

49 *See* N.Y. PENAL LAW § 10.00(4) (McKinney 1987 & Supp. 1996)(defining "misdemeanor" as offense for which sentence of imprisonment is between 15 days and one year).

50 *See id.* § 10.00(5) (defining "felony" as offense for which sentence of imprisonment is over one year).

51 *See* N.Y. CORRECT. LAW § 168-t (McKinney Supp. 1996)(enumerating consequences of an offender's failure to register); *see also Doe III*, 120 F.3d at 1267 (noting failure to register as required by NYSORA is a crime); *Doe II*, 940 F. Supp. at 606 (noting that a number of prosecutions have been brought against individuals who failed to register); *Doe I*, 919 F. Supp. at 695 (providing failure to register under NYSORA is a crime).

52 *See* N.Y. CORRECT. LAW § 168-o (McKinney Supp. 1996) (discussing offender's right to petition for relief but noting courts discretionary right to grant such relief).

53 *See id.* (describing court's process in determining offender's right to relief); *see also Doe III*, 120 F.3d at 1267 (explaining that any sex offender required to register may petition court for relief); *Doe II*, 940 F. Supp. at 603 (providing offenders opportunity to petition sentencing court to be relieved of duty to register); *Doe I*, 919 F. Supp. at 695 (noting possibility of court relieving offender of duty to register).

### C. The Classification and Notification Provisions

NYSORA promulgates three levels of notification to law enforcement agencies and/or the public. The extent of community notification is based on an offender's classification,<sup>54</sup> which takes into account certain factors, including the risk of re-offense and the danger to the public.<sup>55</sup> The greater the risk of a repeat offense and the threat posed to society, the greater the extent of the notification.<sup>56</sup>

<sup>54</sup> See N.Y. CORRECT. LAW §168-l(5) (McKinney Supp. 1996). Several criteria are used to assess the threat offender poses to society but also to determine the extent of community notification necessary. *Id.*; Doe v. Pataki, 3 F.Supp.2d 456, 469 (S.D.N.Y. 1998) [hereinafter *Doe V*]. In assigning risk levels to convicted sex offenders, under the Act, certain procedures are required to satisfy due process. *Id.* at 470. Courts have considered the impact of an erroneous determination of a sex offender's risk level. *Id.* at 469 (quoting *E.B. v. Verniero*, 119 F.3d 1077, 1110 (3d Cir. 1997), cert. denied,—U.S. —, 118 S.Ct. 1039 (1998)). A mistaken underestimation of an individual's dangerousness does not necessarily result in harm because NYSORA mandates registration regardless of an offender's classification. *Id.* at 469–70. In contrast, an overestimation of an individual's dangerousness "will lead to immediate and irreparable harm to the offender: his conviction become public, he is officially recorded as being a danger to the community, and the veil of relative anonymity behind which he might have existed disappears." *Id.* (quoting *E.B. v. Verniero*, 119 F.3d at 1110). Thus, the possibility of error, in risk level classifications, requires greater procedural safeguards before a final risk level can be assigned and notification can proceed. *Id.* at 470.

<sup>55</sup> See N.Y. CORRECT. LAW § 168-l(5) and (6) (McKinney Supp. 1997) (enumerating factors relevant in determining risk level classification); see also *Doe III*, 120 F.3d at 1268 (providing for 3 levels of notification that increase as risk of re-offense increases); *Doe II*, 940 F. Supp. at 607 (specifying 3 levels are designated based on risk of repeat offense and danger to public); *Doe I*, 919 F. Supp. at 695 (setting forth levels of notification to law enforcement agencies and public); Greissman, *supra* note 26, at 194 (discussing assessment of risk level by examining certain factors). Cf. ARIZ. REV. STAT. ANN. § 13-3821 (West 1996) (discussing requirements for registration and classification).

<sup>56</sup> See N.Y. CORRECT. LAW § 168-b(1)(c), -l(5) (McKinney Supp. 1997). Relevant factors used in the Board's determination include: (1) use of violence, (2) sexual contact with victim, (3) number of victims, (4) duration of offense conduct with victim, (5) age of victim, (6) other victim characteristics, (7) relationship between offender and victim, (8) age of offender at first sex crime, (9) number and nature of prior crimes, (10) recentness of prior felony or sex crime, (11) drug or alcohol abuse, (12) acceptance of responsibility, (13) conduct while confined or under supervision, (14) release environment. *Id.*; see also *Doe III*, 120 F.3d at 1268, n. 6. The Board has the responsibility of developing guidelines and procedures to assess the risk of re-offense and potential threat. *Id.* The Board has developed "Risk Assessment guidelines" for determining an offender's level of notification based on this risk assessment. *Id.* This system assigns numerical point values to each of the fourteen risk factors. *Id.* A "risk level" is then calculated for an offender by adding up the points. *Id.* The Board may not digress from this risk level unless it concludes that there is some aggravating or mitigating factor, which needs to be taken into account. *Id.*; Bill Alden, *Megan's Law Classification Raised: Increased Risk Factor Found to be Justified*, N.Y.L.J., Nov. 12, 1997, at A1. There existed particular facts in *People v. Haddock* which warranted an upward departure. For all sex offenders sentenced or released from a state correctional facility after the effective date of the Act, the original sentencing court has the responsibility of determining the risk level, after receiving a recommendation from the Board. See generally N.Y. CORRECT. LAW § 168-d(3), 168-l(6), 168-n(2) (McKinney Supp. 1997). This recommendation should be accepted by the sentencing court unless arbitrary or capricious. *Id.*; *People v. Ross*, 646 N.Y.S.2d 249, 252 (Sup. Ct. N.Y. Co. 1996).

If the Board determines that the risk of repeat offense is "low,"<sup>57</sup> the sex offender is designated Level One, and only notification to local law enforcement agencies is authorized.<sup>58</sup> Members of the public, however, may obtain the Level One sex offender's registration information through a special "900" telephone number.<sup>59</sup>

If the risk of recidivism is determined by the Board to be "moderate,"<sup>60</sup> the offender is given a Level Two designation.<sup>61</sup> The law enforcement agency, which has jurisdiction over the offender, is notified and may disseminate relevant information regarding the nature of the offense<sup>62</sup> to "any entity with vulnerable populations."<sup>63</sup> It appears that the ability to disseminate such information may be problematic due to the fact that NYSORA does not

For sex offenders on parole or probation on the effective date of NYSORA, the Division of Parole and the Department of Probation have the duty of determining the risk levels, with the recommendation of the Board. *Id.*

57 See N.Y. CORRECT. LAW § 168-l(6)(a) (McKinney Supp. 1996) (specifying exact word used in statute).

58 See *id.* (specifying notification authorized for level one offenders); see also *Doe III*, 120 F.3d at 1269 (discussing extent of notification provided for level one offenders); *Doe II*, 940 F. Supp. at 607 (noting only notification to law enforcement agencies is authorized); *Doe I*, 919 F. Supp. at 695 (noting level one does not provide for any public notification); Greissman, *supra* note 26, at 195 (providing that only law enforcement officials are notified when risk of re-offense is low).

59 See *Doe III*, 120 F.3d at 1269. In the context of a Level One offender, callers cannot obtain any information unless they first provide particular, specified information that reasonably identifies the offender. *Id.*; see also Greissman, *supra* note 26, at 220, n.85. A recorded message informs the caller only that the offender is listed in the central registry and that the offender's risk level is Level One. *Id.*; see also Sorensen, *supra* note 17, at 26. New Yorkers can call (900) 288-3838 to check a name against the New York State Sex Offender Registry. *Id.*

60 See N.Y. CORRECT. LAW § 168-l(6)(b) (McKinney Supp. 1997) (specifying exact terms as used in statute).

61 See N.Y. CORRECT. LAW § 168-l(6)(b) (McKinney Supp. 1997) (designating risk level commensurate with moderate risk of re-offense); see also *Doe III*, 120 F.3d at 1269 (providing that police can disseminate information to "vulnerable entities" for level 2 offenders); *Doe II*, 940 F. Supp. at 607 (discussing dissemination of information such as address, photograph and background information); *Doe I*, 919 F. Supp. at 695 (noting that offenders whose risk is moderate are assigned level 2); Greissman, *supra* note 26, at 195 (discussing dissemination by law enforcement for level 2 offenders).

62 See N.Y. CORRECT. LAW § 168-l(6)(b) (McKinney Supp. 1997) (allowing law enforcement agency to disseminate registry information to entities); see also *Doe III*, 120 F.3d at 1269 (providing information may include offender's address, photograph, and background information); *Doe II*, 940 F. Supp. at 607 (noting police may disseminate information); *Doe I*, 919 F. Supp. at 695 (discussing how enforcement agencies are notified and authorized in turn to disseminate); Greissman, *supra* note 26, at 195 (explaining how law enforcement agencies can disseminate information including offender's approximate address).

63 See *Doe II*, 940 F. Supp. at 607. It has been suggested that this term refers to organizations such as child-care centers, schools, or women's shelters. *Id.*; see also Hakala, *supra* note 18, at C10. The term "entity" can encompass anything from an individual to America Online. *Id.*

define "entities." Despite this, the NYSORA further provides for additional dissemination of registration information at the discretion of these enumerated entities.<sup>64</sup> Thus, it seems that any subjectively determined "entity" can further disseminate information without regulation,<sup>65</sup> possibly in violation of an offender's right to privacy.<sup>66</sup>

If the risk of re-offense is "high"<sup>67</sup> and a threat to public safety exists, an offender is deemed a "sexually violent predator," and is classified at Level Three.<sup>68</sup> For this category of offenders, registration information is maintained in a sexually violent predators subdirectory<sup>69</sup> and publicly disseminated in three ways.<sup>70</sup> A person may directly access the subdirectory to obtain the offender's

<sup>64</sup> See N.Y. CORRECT. LAW § 168-1(6)(b) (McKinney Supp. 1997) (providing "any entity receiving information . . . may disclose or further disseminate such information such information at [its] discretion"); see also *Doe III*, 120 F.3d at 1269 (allowing these entities to further disseminate registration information); *Doe II*, 940 F. Supp. at 607 (noting Act does not define term "entity"); *Doe I*, 919 F. Supp. at 695 (discussing how NYSORA does not define "entities", but allows these entities to further disseminate information); Greissman, *supra* note 26, at 196 (explaining how level 3 information is disclosed to vulnerable institutions).

<sup>65</sup> See N.Y. CORRECT. LAW § 168-1(6)(c) (McKinney Supp. 1997) (allowing entities to further disclose registry information at their discretion).

<sup>66</sup> See *Whalen v. Roe*, 429 U.S. 589, 599-600 (1977) (recognizing two separate interests embodied in individual's right to privacy: (1) avoiding disclosure of personal matters and (2) independence in making certain decisions).

<sup>67</sup> See N.Y. CORRECT. LAW § 168 (6)(c) (McKinney 1997) (referring to specific term in statute).

<sup>68</sup> See N.Y. CORRECT. LAW § 168-1 (6)(c) (McKinney 1996) (delineating those offenders whose risk of re-offense is high as "level three" offenders); see also *Doe III*, 120 F.3d at 1270 (noting how statute designates offenders whose risk of repeat offense is "high" as level three offenders); *Doe II*, 940 F. Supp. at 606 (discussing fact that offenders are assigned risk level three if their risk of re-offense is high); *Doe I*, 919 F. Supp. at 695 (explaining that if risk is "high" and "there exists a 'threat to the public safety,' the offender is deemed a sexually violent predator" and assigned risk level three); Greissman, *supra* note 26, at 195 (discussing designation of certain offenders as "sexually violent predators").

<sup>69</sup> See N.Y. CORRECT. LAW § 168-1 (6)(c)(McKinney Supp. 1996) (providing for establishment of subdirectory containing registration information for sexually violent predators); see also *Doe III*, 120 F.3d at 1270 (discussing inclusion of offenders assigned risk level three in subdirectory); *Doe II*, 940 F. Supp. at 606 (noting that this subdirectory contains exact address, other identifying information, and photograph of offender); *Doe I*, 919 F. Supp. at 695-96 (discussing that subdirectory is to be maintained by DCJS); Greissman, *supra* note 26, at 196 (explaining how information concerning sexually violent predators is maintained in a sexually violent predator subdirectory).

<sup>70</sup> See N.Y. CORRECT. LAW § 168-1 (6)(c) (McKinney Supp. 1996) (providing for dissemination of information contained in this subdirectory); see also *Doe III*, 120 F.3d at 1270 (discussing availability of registration information for level three offenders); *Doe II*, 940 F. Supp. at 606 (noting statewide availability of subdirectory, which will be distributed annually to local police departments for public access); *Doe I*, 919 F. Supp. at 696 (explaining how subdirectory will have listings by county and zip code); Greissman, *supra* note 26, at 195-96 (mentioning that person must make written request in order to access information in the subdirectory).

particular identifying information.<sup>71</sup> Alternatively, persons can obtain information through the "900" number,<sup>72</sup> or contact local law enforcement agencies with jurisdiction over the offender, as they are provided with the offender's registration information.<sup>73</sup> The respective agency may then disseminate the registry information, which includes the offender's exact street address, to entities with vulnerable populations.<sup>74</sup> Such an entity may then further disseminate the information it receives at its discretion.<sup>75</sup>

The provisions of the existing notification laws in other states vary.<sup>76</sup> All states do, however, require the offender to notify a lo-

71 See N.Y. CORRECT. LAW § 168-l(6)(c) & 168-q(1) (McKinney Supp. 1996). The subdirectory contains the offender's name, exact street address, photograph and physical description. *Id.* Also contained in the subdirectory is general background information relating to the crime for which he was convicted such as modus operandi, type of victim, and any special conditions of his parole or probation. *Id.* To have access to this subdirectory, a person must make a written request expressing a purpose, and such requests are kept on record. *Id.*

72 See N.Y. CORRECT. LAW § 168-p(1) (McKinney Supp. 1996). In order to receive registry information from this "900" number, callers must provide sufficiently detailed information, including an exact street address, driver's license number or birth date. *Id.* If the exact date of birth or address is unknown, then additional information such as social security number, hair color, eye color, height, weight, distinctive markings, ethnicity or any combination of those characteristics may be requested. *Id.*; see also Greissman, *supra* note 26, at 220, n.98. The DCJS determines whether "the named person reasonably appears to be a person listed", based upon information provided by caller. *Id.*

73 See N.Y. CORRECT. LAW § 168(6)(c) (McKinney Supp. 1997). The local law enforcement agency may disseminate information, using their discretion, to chosen entities. *Id.*

74 See N.Y. CORRECT. LAW § 168-l(6)(c) (McKinney Supp. 1997) (providing for dissemination by local law enforcement agencies to entities with "vulnerable populations"); see also *Doe III*, 120 F.3d at 1270 (noting that registration information for level three offenders may be disseminated by law enforcement agencies having the subdirectory); *Doe II*, 940 F. Supp. at 607 (noting that "registry may be available 'to any regional or national registry of sex offenders for the purpose of sharing information)"; *Doe I*, 919 F. Supp. at 695 (mentioning how level of notification authorized for level two is also authorized for level three, except that for level three offenders, law enforcement agencies may disclose offender's exact address).

75 See N.Y. CORRECT. LAW § 168-l(6)(c) (McKinney Supp. 1997) (allowing entities to further disclose registry information at their discretion); see also *Doe III*, 120 F.3d at 120 (explaining how entities notified of level two and level offenders may further disclose information at their discretion); *Doe II*, 940 F. Supp. at 606-07 (providing for further dissemination). See, e.g., David M. Halbfinger, *Schools Told to Post Photos of Offenders In Sex Cases*, N.Y. TIMES, Nov. 16, 1998, at B5 (discussing order by Queens school board to post photographs of released sex offenders in school hallways or cafeterias).

76 See IDAHO CODE §§ 9340(11)(f)(ii) & 18-8306 (Supp. 1994). In Idaho, "any person" can request the names of registrants and information about the crimes for which they were convicted although addresses are not released. *Id.*; IND. CODE ANN. §§ 5-2-12-11 (Burns Supp. 1994). In Indiana, "entities" may request a copy of the registry but may not obtain the home addresses of offenders. *Id.*; OR. REV. STAT. § 181.589 (1997); *State v. Bateman*, 771 P.2d 314, 316 (Or. Ct. App. 1989). Oregon statute was interpreted by one judge so as to force one released sex offender to post signs on his car and on the door of his home that read "Dangerous Sex Offender. No Children Allowed". *Id.*; see also LA. REV. STAT. ANN. § 15:542; LA ADMIN. CODE tit. 22, § IX 1987. Louisiana similarly brands its

cal law enforcement agency when he is released within the state and establishes residence there.<sup>77</sup> Some state laws, in addition to the federal guidelines,<sup>78</sup> go even further by allowing law enforcement officials to notify communities when a convicted sex offender establishes residence.<sup>79</sup>

## II. THE CONSTITUTIONAL DILEMMA INHERENT IN REGISTRATION AND NOTIFICATION STATUTES

### A. Invasion of a Protected Interest and Justification

Supreme Court precedent has established the right to privacy as fundamental,<sup>80</sup> and implicit within the provisions of the Con-

sex offenders by requiring them to personally notify his neighbors of his address and criminal records by mailing notifications and taking out classified ads at his own expense. *Id.* The offender may also be forced to wear special clothing, post signs on his home or place bumper stickers on his car. *Id.* Louisiana courts have authority through statute to enact any means necessary including but not limited to signs, handbills or bumper stickers or labeled clothing to give "adequate" notice to the community of the presence of convicted sex offenders. *Id.* New York looked to New Jersey's Megan's Law as the model for NYSORA, while attempting to address and remedy some of the legal and logistical problems of Megan's Law. Compare N.J. STAT. ANN. § 2C: 7-1 (West 1996). In New Jersey, authorities are obligated to inform member of the public "likely to encounter the registrant" *Id.*; with N.Y. CORRECT. LAW § 168- C (1) (McKinney Supp. 1996). In New York, community notification is not required, it is merely allowed. *Id.* Law enforcement agencies have the option to disseminate information. *Id.* NYSORA also requires an independent board to determine the level of a sex offender's classification. *Id.* and *Doe v. Poritz*, 662 A.2d 367, 421 (N.J. 1995). Although the prosecutor determines classifications, the court "need not impugn motives of prosecutor to require that independent decision maker review Tier classification". *Id.* Further, in New York, offenders can petition judges for relief from registration requirements. N.Y. CORRECT. LAW § 168-o (McKinney Supp. 1996). However, this relief is not available in New Jersey.

<sup>77</sup> See GA. CODE ANN. § 42-9-44.1 (1995) (requiring convicted sex offenders, as condition of parole, to give notice of his name and address, crime for which he was convicted and date of parole, to superintendent of public school district where he resides and to sheriff of county where he resides); ME. REV. STAT. ANN. tit 34-A, § 11003 (1996) (requiring sex offenders to register his current address with Department of Public Safety Bureau of Identification, within 15 calendar days after discharge); N.D. CENT. CODE § 12.1-32-15 (1997) (requiring convicted sex offenders to register within 10 calendar days of his entering county with chief of police of city or sheriff of county); TEX. REV. CIV. STAT. ANN. art. 6252-13c.1 (1997); WIS. STAT. § 175.45(1)(1996).

<sup>78</sup> See H.R. 3355, 103d Cong., 2d Sess. (1994). On Sept. 13, 1994, President Clinton passed the Violent Crime Control and Law Enforcement Act of 1994 requiring every state to establish a registry of sex offenders. *Id.*

<sup>79</sup> See GA. CODE ANN. § 42-9-44.1 (1995); LA. REV. STAT. ANN. § 15:546(A)(1997), amended by Act No. 1147 S.B. No. 1368; MISS. CODE ANN. § 45-33-17, -19 (1997); N.J. REV. STAT. § 2C:7-5 (1997); N.D. CENT. CODE § 12.1-32-15 (1997); TENN. CODE ANN. § 40-39-106 (1997); WASH. REV. CODE § 4.24.550(1)(1996). See, e.g., Mike Allen, *List of Sex Offenders is Withheld After Girl's Killing in Connecticut*, N.Y. TIMES, Aug. 26, 1998, at B5 (noting that in New Jersey police notify neighbors with hand delivered flyers or registered letters when felon moves into area).

<sup>80</sup> See *Roe v. Wade*, 410 U.S. 113, 152-54 (1972) (stating that right of privacy, al-

stitution.<sup>81</sup> The recognition of this right, however, requires an evaluation of the circumstances surrounding the alleged invasion of this right and a subsequent determination of whether there exists a "reasonable expectation" of privacy.<sup>82</sup> The requirement of a "reasonable expectation" is inherently controversial.<sup>83</sup> Courts have inconsistently found a right of privacy, despite similar circumstances. In particular, courts have neglected to establish a clear and decisive test to determine whether the disclosure of registry information constitutes an actionable invasion of an individual's right to privacy.<sup>84</sup>

The existence of a reasonable expectation of privacy, however, does not ensure that a purposefully imposed restriction will automatically be deemed unconstitutional simply because it treads upon an individual's privacy.<sup>85</sup> Once it has been determined that there is a fundamental right at stake with respect to a statute, the state must come forward with a "compelling interest"<sup>86</sup> to justify such an infringement. The establishment of such

though not explicitly mentioned in constitution, exists); *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965) (declaring "penumbra of privacy" for individuals).

<sup>81</sup> See *Griswold*, 381 U.S. at 482 (declaring "penumbra of privacy" for individuals); *Roe*, 410 U.S. at 152-53 (stating that right of privacy, although not explicitly mentioned in the constitution, exists). See generally Ronald D. Rotunda, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 18.26 - 18.30 (1986) (discussing progression of privacy rights in Supreme Court); Sammel D. Warren & Louis D. Brandeis, *The Right To Privacy*, 4 HARV. L. REV. 193, 193 (1890) (introducing concept of right to be let alone).

<sup>82</sup> See *Wayt*, *supra* note 9, at 144-145 (emphasis added) (noting that in determining violation of right to privacy, court inquires whether plaintiff has "reasonable expectation" of privacy in disclosed information). See, e.g., *National Treasury Employees Union v. Department of Treasury*, 25 F.3d 237, 243 (5th Cir. 1994) (noting that plaintiff does not have standing to sue for violation of right to privacy in federal court if he has no reasonable expectation of privacy).

<sup>83</sup> See *Rowe v. Burton*, 884 F. Supp. 1372, 1388 (D. Alaska 1994) (holding that convicted sex offender does not have reasonable expectation of privacy in information registered with sex offender registry for subsequent public disclosure); see also *United States Dep't of Justice v. Reporters Comm.*, 489 U.S. 749, 764 (1989) (holding disclosure of criminal information contained in F.B.I. files is invasion of personal privacy, despite that information was matter of public record).

<sup>84</sup> See, e.g., Robin L. Deems, Comment, *California's Sex Offender Notification Statute: A Constitutional Analysis*, 33 SAN DIEGO L. REV. 1195, 1223 (1996) (stating that case law provides no clear cut rule addressing issue of whether disclosure of public information is violation of individual's right to privacy).

<sup>85</sup> See G. Scott Rafshoon, Comment, *Community Notification of Sex Offenders: Issues of Punishment, Privacy, and Due Process*, 44 EMORY L.J. 1633, 1644 (Fall 1995) (discussing how states amended civil disability legislation and how this legislation with stood constitutional attack).

<sup>86</sup> See *Doe v. Poritz*, 662 A.2d 367, 413 (N.J. 1995) (holding that although active dissemination affects privacy interests, this invasion is necessary for public protection); Rafshoon, *supra* note 85, at 1651 (discussing how government can take offender's "right to personal privacy" if government's interest is compelling and statute is narrowly tailored to protect liberty interest).

a compelling interest will allow the state to continue to burden the right in issue, as long as the statute is narrowly tailored to meet the interest of the state.<sup>87</sup>

For example, courts have consistently upheld civil disability statutes, which infringe upon convicted offenders' constitutionally guaranteed rights.<sup>88</sup> These statutes take away certain constitutional rights from convicted felons, such as the right to vote,<sup>89</sup> the right to hold office,<sup>90</sup> and the right to bear firearms.<sup>91</sup> Despite these infringements, these statutes have remained a part of our criminal justice system since its inception.<sup>92</sup>

<sup>87</sup> See, e.g., *Roe v. Wade*, 410 U.S. 113, 155 (1973) (stating that regulation limiting "fundamental rights" may be justified only by "compelling state interest"); *Doe v. Attorney General of the United States*, 941 F.2d 780, 796 (9th Cir. 1991) (holding that state legitimate interest can warrant intrusion into individual constitutional right to privacy); *Thorne v. City of El Segundo*, 726 F.2d 459, 469-71 (9th Cir. 1984) (stating that government may seek and use information covered by right to privacy if it can show that its use would advance legitimate state interest); *Doe v. Poritz*, 662 A.2d 367, 373-377 (N.J. 1995) (discussing state interest in protecting society from recidivist sex offenders); Rafshoon, *supra* note 85, at 1651 (stating that governmental interest must be compelling in order to violate offender's right to privacy); Debra L. Weiss, Casenote and Comment, *The Sex Offender Registration and Community Notification Acts: Does Disclosure Violate an Offender's Right To Privacy?*, 20 HAMLINE L.REV. 557, 567 (1996) (discussing that violation of privacy are acceptable when government interests outweigh individual privacy).

<sup>88</sup> See *Lewis v. United States*, 445 U.S. 55, 65 (1980) (upholding prohibition of fire arm possession by convicted felon); *DeVeau v. Braisted*, 363 U.S. 144, 160 (1960) (upholding denial of convicted felon's right to hold office in waterfront labor organization); *Green v. Board of Elections of City Of New York*, 380 F.2d 445, 445 (2d Cir. 1967) (holding disenfranchisement of convicted felon was not form of punishment); see also Rafshoon, *supra* note 85, at 1645 (discussing how civil disabilities legislation has withstood constitutional attack); Note, *The Disenfranchisement of Ex Felons: Citizenship, Criminality, and "The Purity of the Ballot Box"*, 102 HARV. L. REV. 1300, 1314-15 (1989) (stating disenfranchisement of convicted felons was justified by idea that deviants are source of moral corruption).

<sup>89</sup> See, e.g., GA. CONST. art. 2, section 1, part. III (1976) (taking away convicted felon's right to vote).

<sup>90</sup> See, e.g., MO. REV. STAT. § 561.021 (1995) (barring convicted criminals from holding office).

<sup>91</sup> See, e.g., NEV. REV. STAT. ANN. § 202.360 (Michie 1995) (forbidding convicted felons from bearing arms).

<sup>92</sup> See Walter Matthews Grant et al., *The Collateral Consequences of a Criminal Conviction*, 23 VAND. L. REV. 929, 949-50 (1970). Convicted criminals, once released from prison, rightfully do not have the same rights they enjoyed before conviction. *Id.* The rationale that supports such a standing finds a basis in the philosophy of Locke, in that those who break the law lose the right to shape it. *Id.* Examples of familiar civil disabilities such as the loss of the right to hold office have been a distinct part of criminal punishment since the beginning of the union. *Id.* Because civil disabilities, as those enumerated in text, impose private prohibitions on an offender's ability to enjoy certain freedoms, said restrictions are limited and well defined. *Id.* Once the offender commits a crime, he/she acknowledges the loss of a defined right. *Id.* However, concerning sex offender notification and registration laws, it appears that the consequences of the statute are unlimited and also undefined. Arguably, prior to committing the crime, the offender does not know the extent or exactly which right he/she will lose. It seems that such a substantial distinction weakens the argument that an invasion of the right to privacy held by a sex



## B. Balancing a Community's Right to be Secure With an Offender's Right to Privacy

### 1. The Offender's View of What Leads to an Invasion of His Privacy

When a convicted sex offender is released from prison, his "freedom" remains limited by his required adherence to sex offender registration and notification laws.<sup>93</sup> Offenders have consistently argued that the dissemination of the registration information constitutes an invasion of the guaranteed right to privacy.<sup>94</sup> The courts have consistently rejected this argument. Some courts have stated that the offender does not have the requisite reasonable expectation of privacy in this registration information<sup>95</sup> because it is accessible to the public at large.<sup>96</sup> Con-

offender will be considered a civil disability.

<sup>93</sup> See N.Y. CORRECT. LAW §§ 168 to 168-v (McKinney Supp. 1997) (imposing registration requirement upon all convicted sex offenders upon their release); see also *supra* note 14 and accompanying text (listing sex offender statutes for different states).

<sup>94</sup> See *Whalen v. Roe*, 429 U.S. 589, 599-600 (1977) (recognizing right to privacy protects interests in avoiding disclosure of personal matters and interest in independence in making important decisions); *U.S. v. Westinghouse Elec. Corp.*, 638 F.2d 570, 577 (3d Cir. 1980) (finding that certain records such as medical contain facts of personal nature entitled to privacy protection); see also *Wayt*, *supra* note 9, at 142 (describing that offenders have interest in remaining anonymous in order to rebuild their lives and that there is interest in avoiding hostile community reaction to their presence).

<sup>95</sup> See *United States Dep't of Defense v. Federal Labor Relations Auth.*, 510 U.S. 487, 498 (1994) (stating that legislation could provide for release of addresses of employees despite privacy interest in nondisclosure); *Cox Broad. v. Cohn*, 420 U.S. 469, 470 (1975) (holding that sanction may not be imposed for publication of information obtained from official court records, open to public); *Russell v. Gregoire*, 124 F.3d 1079, 1094 (9th Cir. 1997) (stating that information already available to public is not constitutionally protected); *Doe v. City of New York*, 15 F.3d 264, 268 (2d Cir. 1994) (stating that individual cannot expect to have protected constitutional right to privacy in matters of public record); *State v. Ward*, 869 P.2d 1062, 1069-75 (Wash. Ct. App. 1994) (denying defendant's right to privacy argument because criminal records are public information in which no one has right to privacy); *People v. Mills*, 81 Cal. App. 3d 171, 181 (1978) (holding that "... any person who... physically molests... a seven year old child, has waived any right to privacy...").

<sup>96</sup> See *Rowe v. Burton*, 884 F. Supp. 1372, 1384 (D. Alaska 1994). The court ruled that sex offenders did not have a reasonable expectation of privacy in information available through the Alaska registry. *Id.*; see also *Werfel v. Fitzgerald*, 260 N.Y.S.2d 791, 796 (App. Div. 1965). The court stated that it is a general policy of the state to make available for public inspection records kept in a public office. *Id.* In specific, the court held that "Files in possession of the Clerk of the Criminal Court of the City of New York are public records which may be fully examined by any person, unless the papers have been sealed from the public scrutiny by the court or by the terms of the statute." *Id.* at 312. Such information is the final link on a long chain of freely accessible information. In reverse, before access is possible, the name and birth date of the offender is necessary. *Id.*; Memorandum from the Office of Court Administration, State of New York, to Criminal Record Requests Applicants (Dec. 1995). Such information is attainable through a request, along

victed sex offenders assert that it is not the mere accessibility to this data that makes the law unconstitutional; rather the compilation and affirmative dissemination of this information into a comprehensive bundle<sup>97</sup> constitutes the actionable invasion of the right to privacy.<sup>98</sup> Other courts have ruled, however, that any invasion of an offender's right to privacy caused by the dissemination of sex offender registry information is outweighed by the compelling state interest in disseminating such information.<sup>99</sup>

Even when an offender's privacy expectation is deemed reasonable, an invasion of that privacy may not be actionable due to

with payment of a minor monetary fee, to the New York State Department of Motor Vehicles. N.Y. VEH. & TRAF. LAW § 202 (McKinney 1996). Information available from this source includes the make and model of the individual's car and also a physical description, height, hair color, eye color. *Id.* Further, trials are open to the public thereby allowing any member of society to view a defendant. This reality opens the possibility that a member of society may sketch a defendant, note aspects of the case, and combine with this information that which he/she received from state records. This compilation could then be used as a "warning sign" if posted within the community. This in effect will circumvent the need for notification statutes. *But see* United States Dep't of Justice v. Reporters Comm. For Freedom of Press, 498 U.S. 749, 764 (1989). The court found that a privacy interest does not disappear simply because the information was previously available to the public. *Id.*; Michelle Pia Jerusalem, Note, *A Framework for Post-Sentence Offender Legislation: Perspective on Prevention, Registration, and the Public's "Right" To Know*, 43 VAND. L. REV. 219, 245 (1995). The author described problems with the public record rationale utilized by the courts because of the difference between availability and dissemination of public information. *Id.*

<sup>97</sup> *See* United States Dep't of Justice v. Reporters Committee for Freedom of the Press, 489 U.S. 749, 764-765 (1989) (recognizing that power of whole "rap sheet" is greater than sum of its parts, even though this information is available to public through numerous resources); Wayt, *supra* note 9, at 145 (describing that Megan's Law presents information as packages which would be difficult for members of public to ascertain on their own); Rafshoon, *supra* note 85, at 1650 (discussing that privacy violation is greater when government compiles information from various available sources); Weiss, *supra* note 87, at 591 (discussing that privacy could be violated when information could not be compiled after routine search).

<sup>98</sup> *See* Doe v. Poritz, 662 A.2d 367, 409 (N.J. 1995). The court ruled that Megan's Law does not violate an offender's right to privacy but further stated that the information disseminated to the community does implicate a privacy interest. *Id.* When the government allows public access to the bundled information in sex offender registries, allows for an increased threat to the offender's right to privacy. *See* Rafshoon, *supra* note 85, at 1649. Courts have recognized that privacy violations are greater when government compiles information and then takes active steps to release it. *Id.*

<sup>99</sup> *See* Russell, 124 F.3d at 1094 (describing necessity of sex offender statute); Artway v. Attorney General of the State of New Jersey, 81 F.3d 1235, 1267 (3d Cir. 1996) (upholding sex offender statute as constitutional because it satisfied legitimate state interest test); Poritz, 662 A.2d at 412 (discussing strong state interest in protecting society from sex offenders); State v. Lammie, 793 P.2d 134, 140 (Ariz. Ct. App. 1990) (upholding lifetime registration requirement for sex offenders). *But see* Woods v. White, 689 F. Supp. 874, 876 (W.D. Wis. 1988), *aff'd*, 899 F.2d 17 (7th Cir. 1990) (upholding privacy interest in personal information related to AIDS); Glover v. Eastern Neb. Comm'n Office of Retardation, 686 F. Supp. 243, 250 (D. Neb. 1988), *aff'd*, 867 F.2d 461 (8th Cir. 1989) (stating individuals have privacy right concerning personal information contained in their body fluids).

its classification as a civil disability<sup>100</sup> or due to a compelling governmental interest.<sup>101</sup> Essentially, courts engage in balancing the possible consequences of the restriction, both to society and the individual, before determining if the burden is justified by a compelling governmental interest.<sup>102</sup>

## 2. Government's Compelling Interest in Statutory Enactment

State government has been persuaded by various factors in determining what constitutes a "compelling interest" with respect to this statute.<sup>103</sup> Included among these factors are sentiments of public fear and rage,<sup>104</sup> and high recidivism rates for sex offenders.<sup>105</sup> Observers have commented that "sex crimes make people

<sup>100</sup> See Walter Matthews Grant et al., *The Collateral Consequences of a Criminal Conviction*, 23 VAND. L. REV. 929, 949-50 (1970). Convicted criminals, once released from prison, rightfully do not have the same rights they enjoyed before conviction. Civil disabilities provide that once an offender commits a crime, he/she will lose of a defined right. *Id.*

This note acknowledges the possibility of restrictions upon a constitutionally protected interest in the form of civil disabilities, yet will not concern itself with an extensive review of the issue.

<sup>101</sup> See Rafshoon, *supra* note 85, at 1651 (stating that governmental interest must be compelling in order to violate offender's right to privacy); see also *Roe v. Wade*, 410 U.S. 113, 155 (1973) (stating that regulation limiting "fundamental rights" may be justified only by "compelling state interest"); *Doe v. Attorney Gen. of the United States*, 941 F.2d 780, 796 (9th Cir. 1991) (holding that state legitimate interest can warrant intrusion into individual constitutional right to privacy); *Doe v. Poritz*, 662 A.2d 367, 373-377 (N.J. 1995) (discussing state interest in protecting society from recidivist sex offenders).

<sup>102</sup> See Greissman, *supra* note 26, at 206-07 (noting how courts must establish whether intrusion on right of privacy is justified by balancing governmental interest in disclosure against privacy interest of confidentiality).

<sup>103</sup> See *United States v. Salerno*, 481 U.S. 739, 751 (1987) (holding that "regulatory interest in community safety can, in appropriate circumstances, outweigh an individual's liberty interest"); *United States v. Westinghouse Elec. Corp.*, 638 F.2d 570, 577 (3d. Cir. 1980) (describing court's balancing of government's interest in using information, against individual interest and privacy); *People v. Mills*, 146 Cal. Rptr. 411, 413 (1978) (upholding enforcement of provision invading individual's privacy because legislature's rational basis for action outweighed infringement).

<sup>104</sup> See Daniel L. Feldman, *The "Scarlet Letter Laws" of the 1990's: A Response to Critics*, 60 ALB. L. REV. 1081, 1084 (1997) (describing that sex offender registration and notification laws were direct result of public fear due to horrific cases of child sex abuse and murder immortalized in media); Elga A. Goodman, Comment, *Megan's Law: The New Jersey Supreme Court Navigates Uncharted Water*, 26 SETON HALL L. REV. 764, 767-768 (1996) (describing public outrage leading up to enactment of sex offender laws); see also Jenny A. Montana, Note, *An Ineffective Weapon in the Fight Against Child Sexual Abuse: New Jersey's Megan's Law*, 3 J. L. & POLY 569, 571 (1993-1995) (noting public outrage prompted New Jersey's enactment of Megan's Law); Note, *Prevention Versus Punishment: Toward a Principled Distinction in the Restraint of Released Sex Offenders*, 109 HARV. L. REV. 1711, 1712-1713 (1996) (discussing how publicity of crimes committed by serial sex offenders prompted enactment of sex offender statutes).

<sup>105</sup> See Shari P. Geller, *Zero Tolerance For Child Molesters; Sexual Predators: Why Do We Release Convicted Pedophiles So They Can Do It Again and Again? Make It a One Strike Offense*, L.A. TIMES, Dec. 16, 1996, at B5 (stating that recidivism rate within three

crazy...<sup>106</sup> Community notification statutes attempt to quell these fears and re-establish a stronghold over deviant, outrageous conduct.<sup>107</sup> The judiciary finds support<sup>108</sup> for this rationale based on facts and statistics.<sup>109</sup> Sex offender registration and no-

years of release from prison is as high as 75%); Robert Teir & Kevin McCoy, *Approaches to Sexual Predators: Community Notification and Civil Commitment*, 23 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 405, 408 (1997)(noting high profile cases involved repeat sex offenders); see also Joe Lambe & Tony Rizzo, *States Get Tougher on Sex Crimes: Public Outcry About Short Sentences Leads to Laws Requiring Longer Jail Time*, KAN. CITY STAR, Aug. 3, 1997, at A1 (citing recidivism rates among pedophiles and sadists to be as high as 65%); Brian McGrory, *Clinton Sets Tracking of Sex Offenders*, BOSTON GLOBE, Aug. 25, 1996, at A1 (stating that sex offenders who victimize children as twice as likely to have multiple victims as those who target adults); Joyce Price, *States Find New Ways to Stop Sex Offenders*, WASH. TIMES, Oct. 1, 1995, at A1 (discussing that studies have shown recidivism rates among pedophiles range from ten to seventy percent). *But see* Matthew Stadler, *Stalking the Predator*, N.Y. TIMES, Nov. 7, 1995, at A23 (describing Washington state study showing that recidivism by sex offenders has not changed in that state in five years since implementation of notification law).

<sup>106</sup> Montana, *supra* note 104, at 577 n.38 (quoting telephone interview with Karen J. Spinner, Director of Public Education and Policy For New Jersey Association of Correction (Sept. 20, 1994)). See Lambe & Rizzo, *supra* note 105, at A1 (describing "outrage nationwide about vicious sex crimes" as impetus behind calls for harsher punishment of sex offenders); see also *Creare Sends Strong Message About Vulnerability of Teens*, SUN-SENTINEL, Feb. 16, 1997, at C2 (expressing outrage over "wrong, immoral and illegal" sex with minors); *Sex Crime Treatment*, SALT LAKE TRIB., Oct. 22, 1995, at B12 (describing "outraged public's demand that Utah get serious about sex offenders"); Robert Hanley, *Shots Fired at the House of a Rapist, Violence in New Jersey Linked to "Megan's Law"*, N.Y. TIMES, June 17, 1998, at B1 (discussing how shots were fired at house of convicted sex offender after circulation of flier that included his picture, a detailed description, and his address). *But see* Lorraine Dusky, *Do Jocks Rate Special Justice? No, Punish Them With Other Felons*, NEWSDAY, June 28, 1996, at A47 (disparaging society's apparent willingness to forgive promising sports figures' and athletic stars' sexual offenses against women).

<sup>107</sup> See *Doe v. Poritz*, 662 A.2d 367, 370 (N.J. 1995) (stating that statute designed solely to enable public to protect itself from known sex offenders); see also Teir & McCoy, *supra* note 105, at 426 (discussing sex offenders' serious threat to society); Note, *Prevention Versus Punishment: Toward a Principled Distinction in the Restraint of Released Sex Offenders*, *supra* note 104, at 1712 (discussing that states enacted laws that burdened sex offenders for betterment of society); Weiss, *supra* note 87, at 579 (discussing policy reasons behind enactment of notification statutes). Cf. Katherine Seligman, *Megan's Law Warning Targets Fewer in San Francisco: Faced With 1,300 "Serious" Offenders, Police to Notify Neighbors Only in Highest-Risk Cases*, SAN. FRAN. EXAM., Nov. 3, 1997, at B1 (describing police attempts to ensure that information is used "solely to protect the public").

<sup>108</sup> See *United States v. Salerno*, 481 U.S. 739, 751 (1987). The Supreme Court held that "the Government's regulatory interest in community safety, in appropriate circumstances, outweighs an individual's liberty interest." *Id.* at 746; *People v. Mills*, 81 Cal. App. 3d 171, 173 (1978). The court upheld the enforcement of a provision, although it constituted an invasion of privacy, because the legislature's rational basis for action outweighed the infringement. *Id.*; see also *U.S. v. Harris*, 920 F. Supp. 132, 134 (D. Nev. 1996). The district court found a "compelling government interest in crime prevention and community safety" sufficient to subordinate the defendant's constitutional rights to the regulatory limits of the Bail Reform Act. *Id.*; cf. *United States v. Sevench*, 676 F. Supp. 1209, 1213-1214 (S.D. Fla. 1988), *aff'd*, 872 F.2d 434 (11th Cir. 1989). The court found that the government's interest in combating drug abuse far outweighed the defendant's liberty interest, and upheld the enhanced prosecution of drug traffickers under the Anti-Drug Use Act of 1984. *Id.*

<sup>109</sup> See Lin Song & Roxanne Lieb, WASHINGTON STATE INST. FOR PUB. POLICY, ADULT

tification laws, by positively contributing to public safety,<sup>110</sup> outweigh the potential infringement on constitutional rights, including any threats to the offender's right to privacy.<sup>111</sup>

### C. Prior Court Analysis of Registration and Notification Laws in New York

Sex offender registration and notification laws have been the subject of controversy and litigation since their enactment.<sup>112</sup>

SEX OFFENDER RECIDIVISM: A REVIEW OF STUDIES 1, 5-6 (Jan. 1994). A study conducted by the California Department of Justice found sex offenders were five times more likely than other violent offenders to recommit the same offense. *Id.*; see also California Department of Justice, *Effectiveness of Statutory Requirements for Registration of Sex Offenders* at 7, (1988). A sampling of 2,000 children between the ages of ten and sixteen years old, of which 3.2% of females and 0.60% of males have suffered sexual abuse, revealed that children have experienced levels of sexual victimization exceeding that of adults. *Id.* But see Stadler, *supra* note 105, at A23. Washington State Institute for Public Policy released a study in September 1995 which showed that recidivism by sex offenders has not changed in Washington state in the five years since Washington's there community notification law became effective. *Id.*; Song & Lieb, *supra*, at 5-6. Song and Lieb's study also noted the lack of solid scientific evidence that shows treatment programs successfully reduce sex offender recidivism. *Id.* Unlike criminals who violate other laws, the propensity of sex offender to commit these types of crimes does not decrease with age. *Id.*

<sup>110</sup> Compare Jerusalem, *supra* note 96, at 238-39 (discussing deterrent effect of regulation requirements) with Stadler, *supra* note 105, at A23 (indicating lack of change in recidivism rates since enactment of community notification and registration laws) and Song and Lieb, *supra* note 109 (noting lack of evidence indicating that treatment reduces recidivism among sex offenders).

<sup>111</sup> See Doe v. Poritz, 662 A.2d 367, 411-412 (N.J. 1995) (holding that plaintiff's privacy claims were outweighed by state's overpowering interest in public disclosure of relevant data); H.R. REP. NO. 103-392, at 4 and n.10 (1993), available in 1993 WL 484758 (citing People v. Mills, 81 Cal. App. 3d 171 (1978) and People v. Adams, 581 N.E.2d 637 (Ill. 1991) as support for proposition that "registration requirement do not violate. . . the constitutional right[] to privacy"). See generally Kathleen V. Heaphy, Comment, *Megan's Law: Protecting the Vulnerable or Unconstitutionally Punishing Sex Offenders?*, 7 SETON HALL CONST. L.J. 913, 933-37 (1997) (discussing determination that either notification nor registration requirements violate right to privacy); Catherine A. Trinkle, Note, *Federal Standards for Sex Offender Registration: Public Disclosure Confronts the Right to Privacy*, 37 WM. & MARY L. REV. 299, 314-21 (1995) (discussing privacy rights in context of federal guidelines). But see Lawrence C. Levy, *A Caring Father's Choice of Civil Liberty*, NEWSDAY, June 28, 1995, at C1 (arguing that New York's version of Megan's Law is "not worth the price" of sacrificing "American tradition of civil liberty and personal privacy for ever-so-slightly improving the chances" that children will not be victimized by sexual predators).

<sup>112</sup> See, e.g., State v. Noble, 829 P.2d 1217, 1221 (Ariz. 1992) (upholding constitutionality of Arizona registration law); State v. Meyers, 923 P.2d 1024, 1030 (Kan. 1996) (upholding registration provision but striking down public disclosure, holding that such provision constituted punishment for purposes of Ex Post Facto Clause); Louisiana v. Babin, 637 So.2d 814, 817 (La. 1994) (striking down community notification law as ex post facto law); Doe v. Poritz, 662 A.2d 367, 371 (N.J. 1995) (upholding both registration and notification requirements of Megan's Law as constitutional); People v. Afrika, 648 N.Y.S.2d 235, 239 (N.Y. 1995) (upholding constitutionality of NYSORA); State v. Ward, 869 P.2d 1062, 1065 (Wash. 1994) (upholding constitutionality of registration law).

The courts have taken different approaches<sup>113</sup> when analyzing the constitutionality of such provisions. New York's own legislation<sup>114</sup> has been a source of debate within its courts.<sup>115</sup>

A constitutional challenge to NYSORA was unsuccessfully raised in *Doe v. Pataki*,<sup>116</sup> upon a motion for a preliminary injunction regarding the retroactive application of the statute's registration and notification provisions.<sup>117</sup> The United States Court of Appeals for the Second Circuit held that both the registration and notification provisions of NYSORA were constitutional.<sup>118</sup> This was a reversal<sup>119</sup> of the District Court's finding

113 This note addresses only the right to privacy rationale argued by offenders in their opposition to community registration and notification laws. Several courts have dealt with various other grounds, such as the Ex Post Facto Clause, Double Jeopardy, Bill of Attainder, the Eighth Amendment guarantee against cruel and unusual punishment, Equal Protection, and the Due Process Clause. For a further discussion of these constitutional challenges, see Heaphy, *supra* note 111, at 918 & n.10, which discusses subsequent analyses of these challenges.

114 See New York Sex Offender Registration Act, N.Y. CORRECT. LAW §§ 168 to 168-v (McKinney Supp. 1997) (enumerating provisions of New York Sex Offender Registration Act).

115 See *Doe III*, 120 F.3d 1263 (2d Cir. 1997) (holding that neither registration nor notification provisions of NYSORA inflict "punishment" under ex post facto clause), *aff'd in part and rev'd in part*, *Doe II*, 940 F. Supp. 603 (S.D.N.Y. 1996) (holding that notification provision, but not registration requirement, violated Ex Post Facto clause and precluded retroactive application of NYSORA); see also *Doe I*, 919 F. Supp. 691 (S.D.N.Y. 1996) (granting preliminary injunction against retroactive application of NYSORA); *People v. Afrika*, 648 N.Y.S.2d 235 (N.Y. 1996) (holding that NYSORA does not violate ex post facto clause because it is remedial in nature).

116 See *Doe II*, 940 F. Supp. 603 (S.D.N.Y. 1996) (finding notification provisions unconstitutional), *aff'd in part and rev'd in part by*, *Doe III*, 120 F.3d 1263 (2d Cir. 1997) (finding neither notification nor registration provisions unconstitutionally violated Ex Post Facto clause).

117 The plaintiffs moved for a preliminary injunction enjoining retroactive application of the law based on Ex Post Facto grounds. See *Doe I*, 919 F. Supp. at 693. In support of their application, plaintiffs cited a number of incidents involving individuals who were required to register and who were subjected to notification under NYSORA. *Id.* at 697.

One example related one offender's release after pleading guilty to statutory rape, wherein the Westchester County District Attorney's office issued a news release and the registration process became a media event. *Id.* In a second incident a parolee offender was the focus of a mass mailing which identified him by name and address and was sent to all residents of the district. *Id.* This parolee was subjected to harassment and anonymous phone calls, in addition to losing his job. *Id.* A third paroled offender also became the subject of a mass mailing, sent by the Superintendent of Schools for the Cornwall Central School District to all parents and guardians within the district. *Id.* Additionally, several newspapers published articles containing the sex offender's name, picture, address, crime, and other information. *Id.*

118 See *Doe III*, 120 F. Supp. at 1266 (finding neither provision constituted additional punishment for purposes of ex post facto clause).

119 See *Doe I*, 919 F. Supp. at 702. The court ruled that notification provisions constitute punitive measures. *Id.*; see also *Doe III*, 120 F.3d at 1265. The court ruled neither notification nor registration provisions were unconstitutional. *Id.*; *Doe II*, 940 F. Supp. at 604. The court ruled that retroactive application of notification provisions violated ex post facto clause. *Id.* In *Doe I*, the court reasoned that the plaintiffs had to show: (a) that they

that NYSORA's public notification provisions constituted punishment,<sup>120</sup> and increased punishment<sup>121</sup> after the fact in violation of the Ex Post Facto Clause.<sup>122</sup>

On appeal, the Second Circuit reversed the decision of the lower court<sup>123</sup> on the same grounds.<sup>124</sup> The court upheld<sup>125</sup> both the registration and the notification provisions of NYSORA<sup>126</sup> as

were likely to suffer irreparable harm if temporary injunctive relief was not granted; and (b) either (i) likelihood of success on the merits or (ii) sufficiently serious questions as to the merits to make their case appropriate for litigation. See *Doe I*, 919 F. Supp. at 697. The court found that the plaintiffs were likely to suffer irreparable harm based on the rationale that a violation of their constitutional right to be free from Ex Post Facto laws is per se irreparable harm. Finding that the notification provisions of NYSORA were triggered only by an offender's identity and status as a sex offender, it followed that such provisions were Ex Post Facto violations and that the plaintiffs had satisfied their burden of showing irreparable harm. *Id.* at 698.

In contrast, the plaintiffs did not meet their burden of showing irreparable harm with respect to the registration requirements of NYSORA because they were merely informing the police of information the police could have obtained by other means. *Id.*

In assessing the plaintiffs' likely success on the merits, the court had to determine whether NYSORA was punitive in nature, such that its retroactive application would be an impermissible violation of the Ex Post Facto Clause. *Id.* Because the court found that the public notification provisions of NYSORA impose additional punishment, the court held that plaintiffs demonstrated a likelihood of success on the merits. *Id.* The court therefore granted plaintiffs' motion for a preliminary injunction. *Id.* at 702.

<sup>120</sup> See *Doe I*, 919 F.Supp. at 702. The court found that the notification aspects were punitive nature for several reasons. *Id.* First, it was clear to the court that although the legislature's intent in passing NYSORA was to protect communities from the dangers of sex offenders, the legislature also intended to punish sex offenders. *Id.* Second, the design of NYSORA contained "classic indicia of a punitive scheme." *Id.* at 605. Third, public notification is historically punitive in nature, as the "modern-day equivalent of branding and banishment." *Id.* Lastly, the court found that the effect of NYSORA was punishment that resulted in an affirmative disability and restraint on offenders. *Id.*

<sup>121</sup> See *Doe II*, 940 F. Supp. at 626. The court found that community notification increased punishment because it increased the penalty, or "suffering in right, person, or property," imposed on a sex offender for his crime. *Id.* Notification has led to an affirmative disability or restraint on offenders and their families, to excessively harsh results, stemming from the reactions of community members. *Id.*; *Doe I*, 919 F. Supp. at 627. Public notification has also presented an obstacle to offenders in their attempts at rehabilitation after release. *Id.* at 628. The court determined these deleterious effects on convicted sex offenders constituted increased punishment. *Id.*

<sup>122</sup> See *id.* at 631 (holding retroactive application of notification provisions of NYSORA would violate ex post facto clause).

<sup>123</sup> See *Doe III*, 120 F.3d at 1263 (2d Cir. 1997) (noting court's reversal of lower court's decision).

<sup>124</sup> See *id.* The issue before the Court of Appeals was whether NYSORA inflicts "punishment," and thereby prohibiting its application to those who committed their crimes prior to NYSORA's enactment as violative of the Ex Post Facto Clause. *Id.* at 1265-66.

<sup>125</sup> See *Doe III*, 120 F.3d at 1263 (2d Cir. 1997). The Second Circuit concluded that neither the registration nor the notification provisions constituted "punishment" for purposes of the Ex Post Facto Clause, and that both aspects of NYSORA could be imposed upon offenders convicted before the effective date. *Id.*

<sup>126</sup> N.Y. CORRECT. LAW §§ 168 to 168-v (McKinney Supp. 1997). Under NYSORA, convicted sex offenders are required to register personal information which is then compiled into registries made available through various means to the public. *Id.*

constitutional.<sup>127</sup> The Supreme Court of the United States subsequently denied the petition for writ of certiorari.<sup>128</sup>

On remand to the District Court for the Southern District of New York, offenders asserted claims of due process with respect to their right to appeal risk level classifications.<sup>129</sup> The court recognized that community notification under NYSORA implicated a liberty interest on the part of offenders that was protected by the due process clause.<sup>130</sup> The court acknowledged that "a protectible liberty interest may be implicated '[w]here a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him.'"<sup>131</sup> The court ruled that "there was no genuine dispute that the dissemination of the information contemplated by the Act, to the community at

<sup>127</sup> Neither the District Court nor the Court Appeals discussed the constitutionality of NYSORA on right to privacy grounds. In fact, the District Court dismissed as moot the plaintiffs' due process claim, from which the right to privacy argument is derived. *See Doe II*, 940 F. Supp. at 631. *But see* Bill Alden, *Megan's Law Appeal Argued in 2d Circuit: Government Lawyers Face Queries on Statute's Effect*, N.Y.L.J., Jan. 7, 1997, at 1 (noting that Assistant Attorney General and Assistant Southern District U.S. Attorney faced difficult questions on the issue of "safeguards as to the rights of the sex offenders," including acts of vigilantism after disclosure).

<sup>128</sup> *See Doe v. Pataki*, 118 S.Ct. 1066, 1066 (1998) (denying petition for writ of certiorari) (hereinafter "Doe IV").

<sup>129</sup> *See Doe v. Pataki*, 3 F. Supp.2d 456, 459 (S.D.N.Y. 1998) [hereinafter *Doe V*]. Upon remand, offender continued their challenge to the constitutionality of NYSORA, as applied to offenders who committed their crimes, prior to the effective date of NYSORA. *Id.* In addition, offenders' claimed that an administratively assigned risk level classification deprived them of the fundamental elements of due process, namely notice and an opportunity to be heard. *Id.* at 468. In response, the state maintained that the existence procedures, as implemented by the Board and the New York State courts, afford all the process that is constitutionally required. *Id.* at 468-69. The District Court attempted to determine what process is due convicted sex offenders at their risk level classification hearings. *Id.* at 470. In ruling that due process protections required for these hearings "... are not as extensive as those required in a . . . criminal. . . trial' . . . the consequences of registration and notification under the Act are sufficiently serious to warrant more than mere summary process". *Id.* at 470 (citations omitted).

<sup>130</sup> *See Doe V*, 3 F. Supp.2d at 466 (citing *Valmonte v. Bane*, 18 F.3d 992, 998 (2d Cir. 1994)). The court recognized that to establish a due process claim, a plaintiff must show that he possesses a constitutionality protected interest in life, liberty or property and that state action has deprived him of that interest. *Id.* at 466.

<sup>131</sup> *See id.* at 467 (quoting *Wisconsin v. Constantineau*, 400 U.S. 433, 443 (1971)). The court, in its ruling, gave deference to the numerous Supreme Court and Second Circuit decisions that discussed whether governmental actions that effects an individual's good name and reputation invoke a federally protected liberty interest. *Id.*; *see, e.g.*, Where a person's reputation is at stake because of government action, notice and opportunity to be heard are essential. *Id.*; *Board of Regents v. Roth*, 408 U.S. 564, 573 (1972); *Wisconsin v. Constantineau*, 400 U.S.433, 437 (1971). A government employee's liberty interest would be implicated if charges for which he was dismissed imposed stigma on him. *Id.* *But see* *Paul v. Davis*, 424 U.S. 693, 701 (1976) "Reputation alone, apart from some more tangible interest, . . . is neither liberty or property by itself sufficient to invoke the procedural protection of the due process clause". *Id.*



large, is potentially harmful to plaintiffs' personal reputations."<sup>132</sup> On the other hand, the court noted that the state "has a compelling interest in protecting its citizens by giving prompt notification to potential victims and relevant caregivers, with respect to registrants who are accurately determined to be [level two] or [level three] risks."<sup>133</sup>

The latest decision in the case of *Doe v. Pataki*,<sup>134</sup> seems to bring the constitutional challenges to NYSORA full circle.<sup>135</sup> The courts have yet to directly address the issue of the violation of a convicted offender's right to privacy,<sup>136</sup> inherent in the widespread dissemination of registration information. A clear and decisive determination by the Supreme Court of the constitutionality of these laws is imperative. A denial of a petition for a writ of certiorari does not preclude the possibility of the Court fully reviewing and even disapproving of notification provisions.<sup>137</sup>

The Supreme Court must assess the validity of such statutes

<sup>132</sup> *Doe V*, 3 F. Supp.2d at 468. The court was convinced by the offender's argument that "wide spread dissemination of the information is likely to carry with it shame, humiliation, ostracism, loss of employment and decreased opportunities for employment, perhaps even physical violence, and a multitude of other adverse consequences." *Id.*

<sup>133</sup> *Doe V*, 3 F. Supp.2d at 470 (quoting *E.B. v. Verniero*, 119 F.3d 1077, 1107 (3d Cir. 1997), cert. denied,—U.S. —, 118 S.Ct. 1039 (1998) (recognizing compelling state interest in protecting its citizens from released offenders in face of misclassification of sex offender).

<sup>134</sup> 3 F. Supp.2d 456 (S.D.N.Y. 1998).

<sup>135</sup> Compare *Doe I*, 919 F. Supp. 691, 693 (S.D.N.Y. 1996) (holding notification provisions were punishment for purposes of Ex Post Facto clause); with *Doe II*, 940 F. Supp. 603, 630 (S.D.N.Y. 1996) (holding that notification provision, but not registration requirement, violated Ex Post Facto clause and precluded retro active application of NYSORA); *Doe III*, 120 F.3d 1263, 1267 (2d Cir. 1997) (holding that neither registration nor notification provisions of NYSORA inflicts "punishment" under Ex Post Facto clause); *Doe IV*, 118 S.Ct. 1066 (1998) (denying petition for writ of certiorari); *Doe V*, 3 F. Supp.2d 456, 466-67 (S.D.N.Y. 1998) (holding that community notification of convicted offenders implicated protected liberty interests).

<sup>136</sup> See *Doe V*, 3 F. Supp.2d at 467. The court acknowledged that one's name, physical appearance, and criminal history are all matters of public records in which one has no privacy interest. *Id.* The court noted however that because the act makes this information available to the community, in some cases through immediate dissemination of the information on a wide spread basis, a protected liberty interest may be affected. *Id.* Yet, the court failed to definitively rule that this widespread dissemination was unconstitutional because it violated an offender's right of privacy. But see *Court Lets Megan's Law Stand*, NEWSDAY, Feb. 24, 1998, at A21. "Michael Buncher, a New Jersey state public defender said the next federal challenge to Megan's Law will contend that community notification violated personal privacy rights." *Id.*

<sup>137</sup> See *Court Refuses to Hear Challenge to New Jersey Sex Offender Law, Justices Also Leave Standing Sections of NY Statute*, N.J.L.J., Feb. 24, 1998, at 1 (noting Supreme Court's rejection of constitutional challenge to notification provisions); Linda Greenhouse, *Supreme Court Won't Weigh "Megan's Law", Justices Reject Appeals To 2 States' Measures*, N.Y. TIMES, Feb. 24, 1998, at B1 (noting that denial does not set legal precedent nor prevent the Court from hearing future challenges to such laws).

with respect to all aspects of the constitutional challenges.<sup>138</sup> Once these issues are settled, the provisions can serve as an effective means of protecting communities against the dangers and risks associated with released sex offenders, while simultaneously affording the latter their constitutional rights.

### III. HOW FAR IS TOO FAR? EXTENDING THE RATIONALE OF NYSORA TO OTHER REPEAT VIOLENT OFFENDERS

If registration and community notification laws are a constitutionally valid means of achieving the government's interest in criminal deterrence and public safety, as against sex offenders and violent sex offenders, the question then becomes whether they can be applied with equal force to all types of violent offenders.<sup>139</sup> This Note posits that the extension of registration and notification provisions, with respect to other violent offenders, would also withstand constitutional challenge, within certain limits. If communities have the right to know of the presence of convicted sex offenders,<sup>140</sup> then they arguably have a similar right with respect to other released violent criminals who have established residence in their locales.<sup>141</sup>

As it stands now, however, community notification requirements are not imposed upon those convicted of many other crimes of violence,<sup>142</sup> including murder,<sup>143</sup> robbery,<sup>144</sup> and bur-

<sup>138</sup> See *Greenhouse*, *supra* note 137 at B1 (noting that Supreme Court's rulings do not preclude Court from hearing future cases raising different legal arguments); "Megan's Law" Update, PROVIDENCE JOURNAL - BULLETIN, Mar. 7, 1998, at A12 (acknowledging that Supreme Court's denial of certiorari suggests agreement with lower courts' decisions despite fact that laws still face challenges).

<sup>139</sup> See Jon A. Brilliant, Note, *Modern Day Scarlet Letter: A Critical Analysis of Modern Probation Conditions*, 1989 DUKE L.J. 1357, 1357-1360 (1989) (describing various probation conditions which society uses to mark ex-convicts).

<sup>140</sup> See, e.g., *supra* note 14 (enumerating community notification provisions throughout each of the 50 states).

<sup>141</sup> Cf. Licia A. Esposito, Annotation, *States Statutes or Ordinances Requiring Persons Previously Convicted of Crime to Register With Authorities*, 36 A.L.R. 5th 161 (1996) (citing cases upholding registration requirement for individuals convicted of certain drug offenses, "habitual sexual offenders" and "arsonists exhibiting compulsive behavior", but not for juvenile sex offenders).

<sup>142</sup> See *State v. Douglas*, 586 N.E.2d 1096, 1096 (Ohio Ct. App. 1989) (holding against defendant that argued sex offender notification requirement was cruel and unusual punishment because persons convicted of murder, robbery and burglary did not have to register); Jerusalem, *supra* note 96, at 237 (discussing that there is no notification requirement for other violent crimes); see also April R. Bedarf, Comment, *Examining Sex Offender Community Notification Law*, 83 CALIF. L. REV. 885, 932 (1995) (discussing that no other types of offenders are required to notify their communities after serving prison sentence). But see Esposito, *supra* note 141 (noting that some states have registration re-

glary.<sup>145</sup> The recidivism rates for such offenders, however, are just as significant as those of sex offenders.<sup>146</sup>

Moreover, the underlying purposes of community notification laws pertaining to convicted sex offenders<sup>147</sup> apply with equal force to other convicted violent offenders.<sup>148</sup> The difficulty remains, however, in drawing the line between criminal releases that may lawfully be publicized pursuant to a community's right to know, and those that violate the individual's constitutional

quirements for certain offenders); Eric Rasmusen, *Stigma and Self-Fulfilling Expectations of Criminality*, 39 J.L. & ECON. 519, 538 & n.37 (1996) (stating that some states have notification laws for various other offenses such as adultery, bigamy and voyeurism).

143 See, e.g., CAL. PENAL CODE §§ 187-190 (West 1999); FLA. STAT. ANN. § 782.04 (West 1998); MASS. GEN. LAWS 265 § 1 (West 1999); N.Y. PENAL LAW §§ 125.27 & 125.25 (McKinney 1997); TEX. PENAL CODE ANN. §§ 19.01 et seq (West 1994).

144 See, e.g., CAL. PENAL CODE § 212.5 (West 1999); FLA. STAT. ANN. § 772.11 (West 1998); MASS. GEN. LAWS 265 § 17 (West 1999); N.Y. PENAL LAW §§ 160.00-160.15 (McKinney 1997); TEX. PENAL CODE ANN. §§ 29.02 & 29.03 (West 1994).

145 See, e.g., CAL. PENAL CODE § 466 (West 1999); FLA. STAT. ANN. § 810.02 (West 1998); MASS. GEN. LAWS 266 § 14 (West 1999); N.Y. PENAL LAW §§ 140.25 & 140.30 (McKinney 1997); TEX. PENAL CODE ANN. §§ 30.01 (West 1994).

146 See Allan Beck et al., *Survey on State Prison Inmates*, Mar. 1993, at 11. Ninety-four percent of inmates have been convicted of a violent crime or have been previously sentenced to probation or incarceration, while over sixty percent have been incarcerated in the past. *Id.* The Department of Justice Survey further found that the time lapse between offense and re-offense was minimal: ninety-one percent of prison inmates previously incarcerated had been in jail for their offense within five years before their current offense. *Id.*; see also Clarence Page, *More Jails? Less Schools? Way To Go!*, DES MOINES REG., Dec. 29, 1997, at 11. According to FBI statistics, 60% of released convicts are arrested again and 40% are re-incarcerated. *Id.* Moreover, 38% of murderers sentenced in 1992 were on parole when they killed and the habitual offender commits on average more than 200 felonies per year. *Id.*; William F. Weld, *Getting Tough Only Way to Control Mayhem*, MASS. LAW. WKLY, Feb. 26, 1996, at A11. Weld states that "[t]he average American is more than twice as likely to be a victim of a violent crime as to be injured in a car accident; 10 times more likely to suffer at the hands of a criminal than to have a heart attack; as likely to be murdered as to die of AIDS." *Id.*; Doris Sue Wong, *Senate Votes to Put Sex Offenders on Parole*, BOSTON GLOBE, Nov. 14, 1997, at B3. In hopes that supervision provides better deterrence, the Massachusetts states legislature has voted unanimously on a bill placing convicted sex offenders on lifetime parole. *Id.* Massachusetts Senator Bill Beating cited as support an Arizona study reporting that recidivism rates among sex offenders on life time probation dropped from 40% to 1.5%. *Id.*

147 See N.Y. CORRECT. LAW § 168, Legislative Findings and Intent of L.1995, c.192. § 1, eff. Jan. 21, 1996 (citing legislature's purpose for NYSORA, as found in preamble to statute).

148 Compare Clarence Page, *More Jails? Less Schools? Way To Go!*, DES MOINES REG., Dec. 29, 1997, at 11 (quoting statistics showing that 60% of released convicts are arrested again and 40% are re-incarcerated and 38% of murderers sentenced in 1992 were on parole when they killed and habitual offender commits on average more than 200 felonies per year) with Shari P. Geller, *Zero Tolerance For Child Molesters; Sexual Predators: Why Do We Release Convicted Pedophiles so They Can Do it Again and Again? Make it a One Strike Offense*, L.A. TIMES, Dec. 16, 1996, at B5 (stating that recidivism rate of released sex offenders within three years of release from prison is as high as 75%) and Joe Lambe & Tony Rizzo, *States Get Tougher On Sex Crimes: Public Outcry About Short Sentences Leads to Laws Requiring Longer Jail Time*, KAN. CITY STAR, Aug. 3, 1997, at A1 (citing recidivism rates among pedophiles and sadists to be as high as 65%).

rights.<sup>149</sup> The judiciary, namely the United States Supreme Court, must establish the parameters of community notification statutes for different classes of offenders. In balancing the community's right to know with the offender's right to privacy,<sup>150</sup> the line should be drawn where discretion begins.<sup>151</sup>

## CONCLUSION

This Note proposes that released violent offenders<sup>152</sup> be subject to similar registration and notification provisions as Level I<sup>153</sup> and Level II<sup>154</sup> released sex offenders. The compilation<sup>155</sup> of relevant information<sup>156</sup> and the distribution of such information to local law enforcement agencies would serve valuable pur-

149 *Cf. Doe v. Poritz*, 662 A.2d 367 (1995) (exploring notion that extent and totality of information disclosed, and not mere exposure of matters of public record, is problematic to personal privacy interest).

150 *See Rafshoon, supra* note 85, at 165 (noting that government interest must be compelling to violate offender's right to privacy).

151 *See generally* Lori Sabin, *Doe v. Poritz: A Constitutional Yield to an Angry Society*, 32 CAL. W. L. REV. 331, 355-56. (1996) (wondering where line will be drawn on which convicted criminals will have their privacy invaded by notification laws).

152 *See Esposito, supra* note 141, at 161 (noting registration requirements imposed on individuals convicted of certain drug offenses, "habitual sexual offenders" and "arsonists exhibiting compulsive behavior"); *Rasmusen, supra* note 142, at 538 (noting that some states have notification requirements for offenses such as adultery, bigamy and voyeurism).

153 *See Greissman, supra* note 26, at 220 n.85. In the context of a Level One offender, callers cannot obtain any information unless they first provide particular, specified information that reasonably identifies the offender. *Id.*; *see also Doe III*, 120 F.3d at 1269. A recorded message informs the caller only that the offender is listed in the central registry and that the offender's risk level is Level One. *Id.*; *Sorensen, supra* note 17, at 26. New Yorkers can call (900) 288-3838 to check a name against the New York State Sex Offender Registry. *Id.*

154 *See Esposito, supra* note 141, at 161 (noting registration requirements imposed on individuals convicted of certain drug offenses, "habitual sex offenders" and "arsonists exhibiting compulsive behavior"); *Rasmusen, supra* note 142, at 538 (noting that some states have notification requirements for offenses such as adultery, bigamy and voyeurism).

155 *See* N.Y. CORRECT. LAW § 168-l (6)(c) & 168-q(1). The subdirectory contains the offender's name, exact street address, photograph and physical description. *Id.* Also contained in the subdirectory is general background information relating to the crime for which he was convicted such as *modus operandi*, type of victim, and any special conditions of his parole or probation. *Id.* To have access to this subdirectory, a person must make a written request expressing a purpose, and such requests are kept on record. *Id.*

156 *See* N.Y. CORRECT. LAW §168-b (1)(b) (McKinney Supp. 1997) (listing requirements for registration); *see also Doe III*, 120 F.3d at 1267 (listing some of requirements for registering); *Doe II*, 940 F. Supp. at 607 (discussing legislative intent for passage of such registration laws); *Doe I*, 919 F. Supp. at 695 (listing registration requirements and information that must be provided). *See, e.g.,* CONN. GEN. STAT. ANN. § 54-102r(b) (West 1996)(requiring registration within five days of release); ARK. CODE ANN. § 12-12-906 (Michie Supp. 1995)(requiring registration within 60 days of release).

poses<sup>157</sup> without unconstitutionally infringing on an offender's protected privacy interests.<sup>158</sup>

To subject released violent offenders to the extensive notification provisions applicable to Level III sex offenders, however, seems both impractical and unlawful.<sup>159</sup> Problems arise from the fact that there exists no way to target which specific groups or individuals would be particularly vulnerable to attack by these released violent offenders. In contrast, victims of sex offenses are more easily categorized into identifiable groups.

Despite the legitimacy of the compilation and dissemination of registration information to local law enforcement agencies having jurisdiction, problems arise in allowing this data to be further disseminated to "vulnerable entities." Because NYSORA does not define this term, judicial discretion must draw the line.<sup>160</sup>

<sup>157</sup> N.Y. CORRECT. LAW § 168, Legislative Findings and Intent of L.1995, c.192. L.1995, c.192, § 1, eff. Jan. 21, 1996.

The preamble to NYSORA states:

The legislature finds that the danger of recidivism posed by sex offenders, especially those sexually violent offenders who commit predatory acts characterized by repetitive and compulsive behavior, and that the protection of the public from these offenders is of paramount concern or interest to the government. The legislature further finds that law enforcement agencies' efforts to protect their communities, conduct investigations and quickly apprehend sex offenders are impaired by the lack of information about sex offenders who live within their jurisdiction and that the lack of information shared with the public may result in the failure of the criminal justice system to identify, investigate, apprehend and prosecute sex offenders.

The system of registering sex offenders is proper exercise of the state's police power. Registration will provide law enforcement with additional information critical to preventing sexual victimization and to resolving incidents involving sexual abuse and exploitation promptly. It will allow them to alert the public when necessary for the continued protection of the community.

*Id.*; see also *Doe III*, 120 F.3d at 1265 (noting goals of NYSORA as community protection and augmented law enforcement); *Doe II*, 940 F. Supp. at 606-07 (noting that legislatures articulated these two goals in enacting such laws); *Doe I*, 919 F. Supp. at 694-95 (discussing law enforcement agencies' efforts to protect their communities and apprehend sex offenders).

<sup>158</sup> See *Wayt*, *supra* note 9, at 142 (describing that offenders have interest in remaining anonymous in order to rebuild their lives and that there is interest in avoiding hostile community reaction to their presence); Patricia Alex, *Experts Question Rush to Change Sex-Offense Laws*, RECORD, Aug. 11, 1994, at B-7 (noting concerns of legal experts as to community notification of sex offenders as possible violation of offender's right to privacy, due process, and freedom from cruel and unusual punishment).

<sup>159</sup> See N.Y. CORRECT. LAW § 168-1 (6)(c) & 168-q(1). The subdirectory contains the offender's name, exact street address, photograph and physical description. *Id.* Also contained in the subdirectory is general background information relating to the crime for which he was convicted such as *modus operandi*, type of victim, and any special conditions of his parole or probation. *Id.* To have access to this subdirectory, a person must make a written request expressing a purpose, and such requests are kept on record. *Id.*

<sup>160</sup> Cf. Bruce Cadwallader, *Judge Refuses to Enforce Sexual Predator Law*, COLUM. DISP., Mar. 21, 1997, at 1C. Ohio's new sexual predators law, H.B. 180, defines "neighbor" as one "adjacent" to the sexual predator. Law enforcement officials have been left to their

This Note submits that notification provisions for violent offenders be limited to compilation and dissemination to local law enforcement agencies. If information is to be further disseminated, this Note proposes that guidelines be established, setting forth criteria to be evaluated in determining what entities receive the registry information. Further, standards should be established to govern the distribution of information "at [the] discretion" of these entities. It is at this point where an actionable privacy invasion may arise. The state's interest becomes less compelling as the information travels further, subject to fewer procedural safeguards for offenders' rights.

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own discretion in determining whether or not to notify those living above, below, in front of, or in back of the sexual offender. *Id.*

